

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period
From April 1, 1942
Through June 30, 1942
Volume XXVII

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from April 1, 1942, through June 30, 1942.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also provides a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
THOMAS S. LAWSON,
Attorney General.

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OPINIONS

April 1, 1942

Hon. John C. Curry,
Commissioner of Revenue,
The Capitol.

Code of 1940 Title 51, §§753, 755 (a)—Sales Tax—Exemptions—
Government Reservations—Code, 1923, §§ 1505, 1506.—Acts 1935 p.
777—Fort McClellan.

Sale of goods in Alabama by resident of Alabama to another resident of Alabama, or to a person, firm or corporation doing business in Alabama, delivery to be made by seller to purchaser on a government reservation in Alabama, is subject to State sales tax, prior to Jan. 1, 1941.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of February 24, 1942, is as follows:

"IN RE: Alabama Sales Tax—Sales prior to January 1, 1941 when delivery f.o.b. point within Federal reservation.

"You are respectfully requested to advise whether or not, prior to January 1, 1941, the effective date of the Buck Resolution (Public No. 819—76th Congress), the Alabama sales tax was applicable to the sale of tangible personal property made by a seller located within the State of Alabama to Government contractors (citizens of the State or corporations organized under the laws of this State, or foreign corporations qualified to do business within this State), in instances where the property, situated within the State, was sold and delivered to the contractor f.o.b. a point within Fort McClellan, an area over which exclusive jurisdiction had been ceded by the State to the United States."

The question above presented is briefly, as I see it, whether sales otherwise subject to Alabama Sales Tax become exempt therefrom by virtue of Code 1940, Title 51, Section 755 (a) if the goods sold are to be delivered by the seller to the purchaser upon the government reservation known as Fort McClellan.

This involves consideration of the meaning to be given to the somewhat ambiguous language of said Subsection (a), Section 755, supra, whereby the Legislature has declared its intent to exempt, among other things, "the gross proceeds of sales of tangible personal property or the gross receipts of any business which the State is prohibited from taxing under the Constitution and laws of the United States of America or under the Constitution of this State."

At first blush, at least, these words would seem to be merely a pious disclaimer by the Legislature of any intention to run amuck with the Constitu-

tion of the United States or of the State of Alabama. For example, the sales tax, without reference to such exemption, obviously could not be imposed upon interstate commerce business or upon sales to the Government of the United States itself or any of its numerous Governmental instrumentalities, in the absence of its express permission or consent. Evidently the Legislature did not contemplate or have in mind when this legislation was passed such sales or transactions as are now under consideration where both seller and purchaser reside in Alabama and the contract is one of purchase and sale of goods sold in Alabama for delivery upon territory which has been ceded by the State to the United States, pursuant to Code of 1907, Sections 898 and 899 or Code of 1923, Sections 1505-1506. Otherwise, no doubt, such transactions would have been specifically and expressly exempted from operation of the tax. This is especially true in view of the fact that succeeding categories of exemptions are expressly and with elaborate detail described at length, in subsections numbered from Subsection (b) through Subsection (t).

I have been unable, after extended search, to find any decision of our own Supreme Court or the Supreme Court of the United States expressly deciding the question now presented, and I am of opinion, therefore, that it must be answered in the light of whatever authority may be found announcing the principles to be applied.

At the outset it would seem appropriate to invoke the well-known rule of construction whereby ambiguous exemptions from taxes are construed most favorably for the taxing power and strictly against the taxpayer—tax being the rule and exemption the exception. *Doby v. State Tax Commission* 234 Ala. 150, 174 So. 233.

Inasmuch as the transactions under consideration are neither interstate commerce business nor sales to the Federal Government or its Governmental instrumentalities, there remains for consideration the effect upon the taxing power to be given to the statutes, whereby the State has ceded jurisdiction to the United States over all lands heretofore or hereafter purchased or otherwise acquired by the United States for the purpose of erecting thereon armories, arsenals, etc. Code 1923, Sections 1505-1506, *supra*, Acts 1935, p. 777. *State v. Blair*, 238 Ala. 377, 191 So. 237; U. S. C. A., Constitution, art. 1, section 8, clause 17.

The situation is different from that considered in the *Blair* case, inasmuch as in that case the goods had moved in interstate commerce from the State of Texas and come to rest in the State of Alabama on a Federal Reservation. The only question was whether the excise tax imposed by the State of Alabama upon storage or withdrawal from storage of gasoline operated within the area or territory known as Maxwell Field, and the Court held that state law in that respect did not extend into Maxwell Field.

Here, however, as above noted, both seller and purchaser reside or do business in Alabama and the goods are sold in Alabama, presumably from a warehouse in this State. The one circumstance on which is pinned the argument for their exemption is that as a part of the contract of sale the seller engages to deliver them on a Government reservation within the external boundaries of this State, rather than let the buyer himself take them from the warehouse to the reservation.

In a recent case decided by the Supreme Court of the United States, *Wisconsin v. J. C. Penny Company*, 311 U. S. 435, 85 L. ed. 267 the court had under consideration the power of the State of Wisconsin to lay a tax upon transactions beyond the boundaries or jurisdiction of the State. The court discussed at length the nature of a state's taxing powers and of federal restraint or inhibition thereof, under the Constitution of the United States.

On page 443 of the opinion it is said:

"A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the State court. But the descriptive pigeon-hole into which a State court puts a tax is of no moment in determining the Constitutional significance of the exaction. 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' *Henderson v. Mayor of New York*, 92 U. S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that 'in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.'

Lawrence v. State Tax Commission 286 U. S. 276, 280."

On page 444 of the opinion it is further said:

"For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the State has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly civilized society."

It is further said:

"Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. 'Taxable event,' 'jurisdiction to tax' 'business situs' 'extraterritoriality,' are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. **The fact that a tax is contingent upon events brought to a pass without a state does not destroy the nexus between such a tax**

and transactions within a state for which the tax is an exaction. See *Continental Assurance Co. v. Tennessee*, supra. See also *Equitable Life Society v. Pennsylvania*, 238 U. S. 143; *Maxwell v. Bugbee*, 250 U. S. 525; *Compania de Tabacos v. Collector*, 275 U. S. 87, 98; *New York ex rel Cohn v. Graves*, 300 U. S. 308; *Atlantic & Pacific Tea Co. v. Grosjean*, 310 U. S. 412; *Atlantic Refining Co. v. Virginia*, 302 U. S. 22; *Curry v. McCanless*, 307 U. S. 357.

"This analysis is merely a reformulation of the classic approach of this Court to the taxing power of the states. *Lawrence v. State Tax Commission*, supra, p. 280. **Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, or even occasional deviations over a long course of years, not unnatural in view of the confusing complexities of tax problems, do not alter the limited nature of the function of this Court when state taxes come before it.** At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the state and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. **We must be on guard against imprisoning the taxing power of the states within the formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize.**" (Emphasis added)

In the light of the foregoing declaration by our highest court of the principles to be applied in ascertaining whether a state taxing statute clashes with the federal Constitution or laws, can it be seriously contended that the sales under consideration are immune from Alabama sales tax?

The effect of our decisions is that the tax is, in effect, imposed on the consumer or ultimate purchaser and is levied on, and must be reported and collected by, the seller from the purchaser upon payment by the latter of the purchase price, variously referred to as "gross proceeds of sales," "gross sales," "gross receipts," Code 1940, Title 51, § 753. *McPhillips Mfg. Co. v. Curry*, 2 So. 2 d., 600; *Lone Star Cement Corp. v. State Tax Commission*, 234 Ala. 465, 175 So. 399; *Long v. Roberts*, 234 Ala. 570, 176 So. 213; *National Linen Service Corp. v. State Tax Commission*, 237 Ala. 360; *Wood Preserving Corp. v. State Tax Commission*, 179 So. 254; See also: *State of Alabama v. King and Boozer*, ——— U. S. ———, 86 L. ed. 1.

It is said in support of the claim of exemption that such sales are "consummated" by delivery on the government reservation, and that until thus "consummated" they cannot be taxed. The exact meaning of the term is not entirely clear. The exemption section of the sales tax law makes no reference to "consummation" as the test of taxability. The sales contract itself is not fully "consummated," or at any rate is not fully executed on both sides until there has been not only delivery by the seller but also payment by the buyer of the purchase price or "gross proceeds of sales." The tax, nominally at least, is laid against and measured by such proceeds of sale and is not collectible or payable to the State until collected by the seller or paid by the purchaser; except that upon default by the seller to collect, the seller himself must pay. The

proceeds of sale or the purchase price may be paid on the reservation or may be paid elsewhere in Alabama where both parties to the contract reside and do business.

As said in *Wisconsin v. J. C. Penny Co.*, supra, at page 444, **"the fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."**

It goes without saying that both parties to the sales contract sought to be taxed have enjoyed the "protection, opportunities, and benefits given by the state;" that the State's laws must be invoked in the State's courts for the vindication or enforcement of the contract; and that the State has given to the parties its "protection, opportunities, and benefits," for which it asks the tax in return.

It is to be noted also that the exercise of taxing power in this instance in no wise conflicts with the legislative power or jurisdiction of the United States over the territory ceded to it by the State for use as arsenals, forts, etc. Congress has not attempted to legislate with reference to sales "consummated" by delivery upon the ceded territory. Moreover, the transactions sought to be taxed originate off the reservation, and will doubtless be "finally consummated" by payment of the purchase money, likewise off the reservation. Delivery is merely one episode in the train of events leading to a complete execution on both sides by final payment of price. Delivery is merely an incident to the complete transaction. Until payment is made the tax liability does not arise and may not be enforced.

In *Superior Bath House Co. v. McCarroll*, 312 U. S. 176, 85 L. ed. 721, with reference to State taxing power over operations carried on upon territory ceded by a State to the United States, for use as a national park, it was said: **"The State's power to lay the tax, being independent of its jurisdiction over the ceded territory, subsists unless waived or prohibited by competent authority."** (Emphasis added)

Said the court also:

" * * * if Arkansas had made an unrestricted grant of the reservation it could not be said to have renounced its authority to tax income of its corporations or citizens from property on the reservation, more (sic.) that if it were located in the District of Columbia or in another State. It clearly has not done so by agreeing that the United States shall have exclusive jurisdiction over it for any or for every purpose." (Emphasis added)

And as in the present instance, by analogy it may be said that the fact that Alabama had ceded territory and exclusive jurisdiction thereof to the United States at Fort McClellan, for forts, arsenals, etc., does not impair or obstruct its power to lay and collect a sales tax with respect of sales otherwise taxable, because incidentally delivery is made by the seller to the pur-

chaser within the ceded territory. Such power has been neither waived by the State nor prohibited by competent authority, to wit, the Constitution of the United States or the Congress.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 1, 1942

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Code of 1940, Title 51, Section 618—Deed Filing Tax—Sales for
Division—Register's Deed—

Where property is sold under a decree of a court for division the deed filing tax upon a deed executed by the register pursuant to said decree is to be measured by the value of the interest acquired by the grantees in excess of such interest as they held in the land conveyed at and prior to the time of conveyance by the register.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion, bearing date of March 27, 1942, is as follows:

"We have a deed filed for record in the Probate Office and we want to ask your advice in fixing the amount of deed tax to charge.

"The deed is to real estate sold through Chancery Court for Division and was made by the Register. The purchasers at the sale were three of the Joint Owners. These three joint owners had previously obtained deeds to the major portion of said lands and the decree ordering the sale required the Register to credit to any joint owner or owners, should one or more become the purchaser or purchasers at the sale, the amount of the sale money to which such one or more might be entitled, and required only the amount of cash paid into Court above such credit.

"The land sold at the sale for \$5,050.00 and the deed recited that after crediting the joint owner-purchasers with their share of the purchase money there was a balance of \$585.00 to be paid into court, which amount represented the costs and the distributive share going to the other joint owners. These facts are recited in the Register's Deed.

"It seems to us that, since the joint-owner-purchasers had paid taxes on deeds to the share already owned by them prior to the sale and prior to the Register's Deed, it would not be necessary to collect taxes on any amount above \$585. Enclosed is copy of Register's Deed. Please advise us in this matter."

Under Code 1940, Title 51, Section 618, the so-called deed filing tax is measured by the value of the property or interest therein conveyed by the deed or other instrument upon the recording of which the tax is imposed. This view is emphasized by the proviso in the latter part of said Section 618 that said section "shall not be so construed or enforced as to require the payment of privilege tax herein provided on mortgages, deeds of trust or other instruments in the nature of a mortgage or deeds or other instruments with vendors lien except as to that part of the purchase price, which is paid in cash or other articles of value and which pay no other privilege tax for recording." See also Quarterly Report of Attorney General, Volume I, page 31; Biennial Report of Attorney General, 1928-1930, page 683.

From your letter and the copy of the deed, thereto attached, it appears that prior to the sale for division and prior to execution of the register's deed based thereon, the grantees in said register's deed had acquired by deeds, which they had recorded and on which they had paid the deed tax, the undivided interests in the property owned by some of the joint owners and that the value of the interest acquired by them under the register's deed, exclusive of their previously owned interest, was only \$585.00.

I am of opinion, therefore, that in this instance the deed filing tax should be calculated upon the latter amount.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 2, 1942

Hon. Howard Kirby,
Clerk of Circuit Court,
Etowah County,
Gadsden, Alabama.

Probation Law—Code 1940, Title 42, Sections 19 Et Seq.—

Time of Beginning of Execution of Sentence—

1. If probation is denied by the court, the execution of the sentence begins on the day of the denial of probation.

2. No credit allowed for the time elapsing during the period of investigation and order denying probation.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of March 23, 1942, is as follows:

"Please render me an opinion on the following, at your very earliest convenience:

"When a defendant imprisoned in Jail has been convicted, made application for probation, and remanded back to jail pending investigation for application for probation, and later application denied, does the sentence date from the original date of sentence, or from the date application for probation denied? If the defendant is out on bond and application for probation denied, would the sentence date from date of original date of sentence, or from the date application for probation denied?"

Your questions grow out of the provisions of the Probation Law found in Code 1940, Chapter 2, Title 42, Sections 19-26.

Section 19 of this Title vests power in the court to suspend execution of the sentence in cases where the defendant has plead guilty or after the return of a verdict of guilty by the jury or the rendition of a judgment of guilty by the court. Construing the language literally, the defendant can make application for probation immediately after a plea of guilty, or return of a verdict of guilty by a jury or the rendition of a judgment of guilty by the court; in the first two instances, before there has been a judgment rendered on the plea of guilty or verdict of the jury and, in all three instances, before there has been any sentence rendered. The law requires a formal judgment to be rendered on the plea of guilty and on the verdict of the jury finding the defendant guilty. No appeal can be taken from a plea of guilty or a verdict of guilty by a jury. The appeal is taken from the judgment rendered on the plea of guilty or the verdict of guilty of the jury. This judgment may be rendered at the time of the entry of the plea of guilty or the return of a jury finding the defendant guilty but it may be made and entered later, even years thereafter. *Clanton v. State*, 96 Ala. 111, 11 So. 299; *Beaird v. State*, 217 Ala. 355, 116 So. 367.

During all of this time the case is in fieri and the court retains jurisdiction to complete the proceedings in the case. *Beaird v. State*, supra. Cf. Quarterly Report of the Attorney General. Vol. XX, page 274.

The proceedings are not complete until there is a sentence putting the judgment of conviction into effect and force. While the word "sentence" has been loosely applied to a judgment of conviction, it has been defined more clearly as follows:

"It describes any judgment of a criminal court; it is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained. In its technical sense it means a final determination by or of a criminal court, which fixes the punishment to be imposed; the final determination of the trial in a criminal cause; the final judgment in a criminal case,

the imposition of a punishment or enforcement of a penalty; the judgment of the court, upon conviction for crime, formally declaring to the accused the legal consequence of the guilt, for which he has been convicted or has confessed, or formally pronounced, by the court or judge upon the defendant after his conviction; awarding the punishment to be inflicted; * * * the order of the court, made in the presence of defendant and his counsel and entered of record, pronouncing the judgment and ordering the same to be carried into execution in the manner prescribed by law; the pronouncement by the judge of the penalty or punishment as the consequence to the defendant of the fact of his guilt." 57 C. J. p. 128, Section 5.

To the same effect is 24 C. J. S. p. 15, Section 1.

The sentence may be entered at the time of the rendition of the judgment of conviction and incorporated in this judgment or it may be entered at a later date and a record thereof made by a separate judgment or order. 24 C. J. S. pp. 28-29, Section 1564; *Jacobs v. State*, 23 Ala. App. 149, 122 So. 806, Cert. Den. 219 Ala. 511; *Franks v. State*, 28 Ala. App. 132, 179 So. 649; *Corrunker v. State*, 19 Ala. App. 500, 98 So. 363; *Snyder v. State*, 18 Ala. App. 188, 90 So. 40.

It is beyond the field of debate that the legislature, in providing for probation in the first instance in the circuit court or court of like jurisdiction, intended that there should be no final action on proceedings instituted for probation until there was a judgment of conviction and a sentence of conviction rendered thereon. This Probation Law expressly says the court "may suspend execution of sentence." Under the Probation Law the court may, and in some cases, must, make or order investigation to determine whether or not the defendant should be put upon probation. Under the general rule of law, when a defendant is sentenced by order of the court based on a judgment of conviction, the execution of the sentence begins at once. Perforce, the provisions of the statute authorizing or requiring investigation to determine whether or not the defendant is to be probated, there must be a temporary order staying execution of the sentence or the court may, as provided in Section 21 "continue the cause for such time as may be reasonably necessary to enable the probation officer to make his investigation and report." During this period of time, execution of the sentence is held in abeyance—in suspense—unexecuted. This must follow because the very purpose of the probation proceedings is for the court to determine whether or not the defendant shall be required to execute the sentence or any part thereof. The word "suspend" as used in the statute means to stop temporarily, to postpone, to suspend sentence on a convicted man or to cease temporarily from operation. Webster's New International Dictionary, Second Edition.

The word "execution," here used, means performance. The statute says suspension of execution, that is, stop temporarily or defer to a later date the execution of the sentence. It is execution of the sentence that is suspended and not the judgment of conviction.

It must logically follow that during this period of time the defendant is not performing any part of the sentence, and it is not until the investigation has ended and the court has refused probation that execution of the sentence

begins. This is not only compelling logic but is the holding of the authorities. 16 C. J. p. 1337, Section 4143; *Belden v. Hugo*, 88 Conn. 500; 91 Atl. 369. This last authority, in commenting on this principle uses this forcible language:

"A sentence unexecuted entails no punishment upon the offender. It is only a judicial pronouncement. It is the carrying into effect of the sentence, by process providing for its execution, which results in punishment. A suspension of execution necessarily involves a suspension of the penal consequences of the judgment. Suspension is altogether inconsistent with operation."

It is clear from the foregoing that my opinion is that the date for the beginning of the execution of the sentence by the defendant is the day probation is denied by the court.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 3, 1942.

Hon. W. D. Johnston,
Member, County Board of Education,
Greene County,
Boligee, Alabama.

County Board of Education—

Whether schools in district in which district tax is **not levied** should be maintained for same term as those in districts in which district tax is **levied**, is within the sound discretion of the county board of education.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

Your request for official opinion bearing date of March 28, 1942, is as follows:

"As a member of the Greene County Board of Education, I give you herewith a statement of facts, and desire to have your opinion upon the following questions based upon said facts.

"Greene County has two school districts, one of which is known as school district No. 6, and the other is known as school district No. 1. School district No. 1 levies the full county and district school tax allowed

under the law, while school district No. 6 does not levy any district school tax applicable only to that district. The Greene County Board of Education has fixed the school term for this year for district No. 6 at 6½ months, while the school term for this year for district No. 1 has been fixed at 8½ months.

"While the people of school district No. 6 understand the law to be that no part of the tax levied and collected in school district No. 1 can be used outside of that district, yet they do feel that they are being unduly penalized for their failure to levy the school district taxes in school district No. 6, and that there is too great a difference between the school terms provided for the two districts.

"My information is that after providing the 8½ months school term for school district No. 1, there are sufficient funds available to the credit of the Greene County Board of Education during this school year with which to provide at least an additional two weeks school term for school district No. 6 without in any way taking any part whatsoever of the school district tax funds from school district No. 1.

"There is located in district No. 6 only one school which it is contemplated to run for the additional period of two weeks above mentioned and the costs of running this school for this additional period is approximately \$210.00.

"(1) Under this statement of facts, please advise whether the Greene County Board of Education has the authority, the money being available in funds other than those derived from school district taxes and not otherwise appropriated, to appropriate such amount out of such funds as may be necessary to provide the additional term of two weeks for the school in district No. 6?

"(2) What is the duty of the Greene County Board of Education under these circumstances with respect to providing two weeks additional school term for the school in district No. 6?

"(3) Would the appropriation by the Greene County Board of Education of the amount necessary to run the school in district No. 6 for the additional period of two weeks constitute a violation of any law or regulation?

"Your early response to these questions will be greatly appreciated."

Answering your first inquiry, it is my opinion that, under the facts stated, the Greene County Board of Education has the authority to appropriate such an amount as may be necessary out of public school funds not otherwise appropriated, to provide for a longer term for the school now being operated in district No. 6.

The statutes relating to the general authority and power of the county board of education are quoted below (Code 1940, Title 52, Sections 62, 72, 73 and 74):

"§62. Administration and supervision of schools.—The general administration and supervision of the public schools (sic) of the educational interests of each county, with the exception of cities having a city board of education, shall be vested in the county board of education. Provided, however, such general administration and supervision of any city having a city board of education may be consolidated with the administration and control of educational matters affecting the county and vested in the county board of education."

"§72. Uniform system of schools maintained.—The county boards of education shall maintain a uniform and effective system of public schools throughout their respective counties."

"§73. Educational policy of county.—The county board of education shall determine with and on the advice of the county superintendent of education, the educational policy of the county, and shall prescribe rules and regulations for the conduct and management of the schools."

"§74. Supervision of schools.—The county board of education shall exercise through its executive officer, the county superintendent of education, and his professional assistants, control and supervision of the public school system of the county. The board shall consult and advise through its executive officer, and his professional assistants, with school trustees, principals, teachers, and interested citizens, and shall seek in every way to promote the interest of the schools under its jurisdiction."

In Title 52, Section 209, relating to the purposes and plan of apportionment of the Minimum Program Fund, it is provided:

"§209. Purpose and plan of apportionment.—In addition to all other appropriations and apportionments of public school money now provided by law and made available for elementary and high schools there shall be apportioned and paid to county boards of education from the minimum program fund the amounts to be determined as hereinafter provided and in accordance with regulations of the state board of education. This minimum program fund shall be used principally (1) to aid in providing at least a seven months' minimum term for all schools, and (2) to assist in the promotion of equalization of educational opportunity for all children in the public elementary and high schools. * * * 1. **Requirements for participating in the fund.**—In order for the public schools of a county, including the independent cities, to share in the apportionment of the minimum program fund, and to receive the maximum benefits therefrom, they shall meet the following conditions: * * * b. In the expenditure of all funds available for the minimum program as herein defined, the county shall as nearly as practicable provide the same length of term in all schools except in schools located in non-tax areas. c. Beginning July 1, 1935, the county shall provide a school term of at least one hundred and forty days, or such part of that school term as can be maintained by using funds available and as defined by regulations of the state board of education; provided, that in case any district or districts are not levying and collecting the three-mill district tax or the equivalent the county board of education shall not be required to maintain in such district or districts the minimum term of one hundred and forty days; * * *"

So that, the statutes vest wide discretion in the county board of education as to the apportionment and allocation of school funds which are subject to apportionment (that is to say, funds which, under the constitution or the statutes, are not required to be expended in the school districts to which they are allocated.)

In *State ex rel King et al v. County Board of Education of Russell County*, 214 Ala. 620, 108 So. 588, the Supreme Court in considering a similar question, said:

"The general administration and supervision of the public schools and of the educational interest of each county (with exceptions not here necessary to specify) is vested in the county board of education (section 77, School Code), and numerous provisions of our statutes disclose the very broad latitude of authority granted to such board. Such boards are vested with a very broad discretion. *Christian v. Jones*, 211 Ala. 161, 100 So. 99, 32 A. L. R. 1340.

"The qualifying words 'as nearly as practicable,' found in the provisions of our Constitution and statute, quoted above, to the effect that these boards apportion the public school funds so as to provide, as nearly as practicable, school terms of equal duration, disclose a further intention that in such apportionment the board is to continue to exercise a wide discretion. The county board is presumed to be acquainted with the local needs and expenses incident to the administration of the county schools. A term of equal duration for each of the public schools is the goal to be attained, if practicable. But the words 'as nearly as practicable' disclose that exaction in that respect may not always be attainable from a practicable standpoint, and therefore much must be left to the wise discretion of the board in the conscientious discharge of its delicate and responsible duties, a discretion which is judicial in its nature. Very clearly, it was not the purpose of the lawmakers that the discretion of the court be substituted for that of the county boards."

See also *Harman, Supt. of Education v. Ide*, 224 Ala. 414, 140 So. 418.

So that it seems clear that under the statutory provisions cited *supra*, the county board of education, in the exercise of its discretion, may allocate funds, not otherwise appropriated, to extend the term of the school in district No. 6.

Your second inquiry has, in effect, been answered by a discussion of your first inquiry, *supra*.

As pointed out by the court in *State ex rel. King v. County Board of Education of Russell County*, *supra*, "a term of equal duration for each of the public schools is the goal to be attained, if practicable."

In my opinion, it is the duty of the Greene County Board of Education to consider all the facts and circumstances and, if, in the judgment of its members, the interests of the school system of Greene County will best be served by the allocation of funds for the extension of the term of the school in district No. 6, it should take the necessary action to that end. If, however, upon consideration of all the surrounding facts and circumstances, it is the best judgment of the members of the said Board that the interests of the

school system of Greene County would not be best served by such allocation for such purpose, it would be its duty to decline to make an allocation of additional funds therefor.

As appears from the general discussion hereinabove, your third inquiry must be answered in the negative.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 6, 1942

Hon. J. C. Grady,
Judge of Probate,
Chambers County,
Lafayette, Alabama.

Counties—Authority to erect and maintain hospitals separately or in conjunction with municipalities—

1. A county has authority to erect and maintain hospitals in its own name or jointly with municipalities.
2. The county may receive and accept donations from persons for the purpose of erecting and maintaining county hospitals.
3. The county has no authority to receive and accept donations from persons for the purpose of erecting and maintaining hospitals on consideration that such donors shall participate in the management of the hospital or receive any special benefits as to rates or service from the hospital.
4. The county management of such hospitals may make reasonable rules as to rates and service.
5. The management of the hospital may give lower rates or special service per member of a group of patients than the rate for one patient not a member of a group.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of March 30, 1942, is as follows:

"I will appreciate it very much if you will give me your opinion on the following questions, which are of considerable importance to Chambers County in plans which it is endeavoring to make in building and operating a hospital.

"Chambers County proposes to build, equip and maintain a hospital costing approximately \$300,000.00, on lands to be donated to it; the hospital will be located in the Chattahoochee Valley to serve the public generally; the population of the five Valley towns is approximately 30,000 people, about 24,000 of whom are composed of the employees, and their dependents, of the large industrial plants located in these towns, which are under one management; this industrial establishment proposes to make a contribution of around \$150,000.00, the County will appropriate a small amount, and the balance of the funds would be raised by donations from individuals and civic organizations.

"1. Can the County legally establish and operate such hospital on the basis outlined?

"2. Can the County legally accept donations for the purpose of building and operating such hospital?

"3. Could it divide the management and control with others, individuals or organizations, or must it retain exclusive control and management?

"4. Could any preference be legally given to the employees and their dependents, of the industrial establishment making large contribution and in consideration thereof by contract, or otherwise, in the use of the facilities of the hospital in reduction of rates or special attentions?

"5. Could the County make contracts with large groups for use of hospital facilities at rates lower than would be charged the general public or individuals? This question contemplates the usual group hospitalization plans.

"I will appreciate it very much if you will advise me in regard to the above."

I will undertake to answer your questions one after the other.

Question 1. It is the settled law of this State, as well as elsewhere, that the duties, authority, and jurisdiction of counties and county commissioners are delegated to them by the constitution or statutes of the State and they act, and can act only, when expressly authorized by the constitution or the statutes or necessarily implied authority arising from the express powers granted. This implied authority only arises when it can be reasonably and logically necessary for the execution of the express authority granted. *Rhodes v. Marengo County*, 204 Ala. 667, 88 So. 850; *State ex rel. Chilton County v. Butler*, 225 Ala. 191, 142 So. 531; *State ex rel. Tallapoosa County v. Butler*, 227 Ala. 212, 149 So. 260; *Corning v. Patton*, 236 Ala. 354, 182 So. 39; 14 Am. Jur. p. 200, Section 28; 20 C. J. S. pp. 801-803, Section 49.

With these settled principles in mind, I have examined our constitution and statutory law and find nothing in the constitution pertinent to the question in hand. The general powers of the county commissioners are catalogued in Code 1940, Title 12, Section 12. Code 1940, Title 12, Section 177 vests control of all county property in the court of county commissioners and Title 12, Section 178 of the Code requires that county buildings are to be erected and kept in order and repaired at the expense of the county under the direction of the court of county commissioners.

Code 1940, Title 22, Section 189 authorizes county and municipal corporations to erect hospitals and it also provides that the county and municipalities may unite in the establishment and erection of hospitals for the reception of the sick or infirm or of persons suspected of having contagious or infectious diseases and that they may make all needful rules and regulations for the control and management of such hospitals. Authority to construct hospitals is also conferred upon the county commissioners. Code 1940, Title 12, Section 185.

Code 1940, Title 22, Section 190, authorizes the county and the municipalities to make appropriations out of their respective funds to aid in maintaining and taking care of all sick and wounded persons who are unable to provide for themselves. Again, this authority is conferred upon municipalities by Code 1940, Title 28, Section 494.

From these statutory provisions, it is my opinion that the county may erect and maintain a county hospital for the purposes mentioned in your letter and further the county and the five municipalities referred to in your letter may conjointly erect and maintain such hospital.

Question 2. Under the statutes above cited, the county is authorized to buy and sell property and hold the title thereto and, therefore, is authorized to receive and accept gifts from individuals or corporations for the purpose of erecting a hospital and maintaining the same. 24 Am. Juris. p. 738, Section 18.

Question 3. It is my opinion, based on the authorities and statutory provisions above cited, that the county has no authority to arrange or agree with donating individuals or organizations for a joint management and control of the hospital. However, the county and the municipalities erecting and maintaining the hospital jointly may arrange for a joint management and control of such hospital.

Question 4. Keeping in mind and applying the principles set forth by the cited authorities above, the county commissioners are without authority to make arrangements of contracts with persons donating funds to the county for the erection of a hospital that, in consideration of such donations, such donors shall have any preference in rates or service to them or their dependents or employees. We are not to be understood as holding that after the hospital is erected the county, or county and the municipalities joining in its construction, have no power to make rules and regulations as to rates and charges for the different characters of service.

Question 5. In matters here involved the acts of the county authority fall within the field of discretionary acts and the commissioners or managers of the hospital may make rules or regulations authorizing contracts to serve all of a large group of persons at a lower rate per person than is charged for a like service for one single individual not a member of such group. Such rules must at all times be reasonable and based on substantial basis therefor.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 7, 1942.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Section 365, Title 62, Code of 1940 construed—Jefferson County—
Solicitor's Office—

1. The salaries of shorthand reporter, stenographers and other clerical help, appointed by the Solicitor of Jefferson County, are payable from the general fund.

2. The expense of purchasing and operating automobiles for the Solicitor's Office of Jefferson County is payable from the Solicitor's fund, as supplemented.

3. The expenses of salaries for stenographers, etc., for the Solicitor's Office of Jefferson County are payable directly from the general fund and do not comprise any part of the \$7500 which is available from the general fund after the Solicitor's fund has been exhausted.

4. The \$7500 which is available from the general fund in any one year after the solicitor's fund is exhausted means the year beginning with the term of office of the solicitor and ending on the same date of the following year.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

Your letter of March 21, 1942, in which you request an official opinion, is as follows:

"Please refer to the following references:

"Codification of 1929 Local Acts of Jefferson County, page 296-300; General Acts of 1923, page 200-201; General Acts of 1927, page 103; Local Acts of 1900-01, page 308; Opinion of the Attorney General 1918-20, page 281; Opinion of the State Supreme Court, Sou., Volume 79, page 483; 1940 Code of Alabama, Title 13, Sections 252-253, Title 62, Section 365 and advise me in answer to the following:

"1. Are salaries of stenographer, shorthand reporters and other assistants employed by the Circuit Solicitor of the Tenth Judicial Circuit payable from the Jefferson County General Fund or from the Jefferson County Solicitor's Fund?

"2. If you hold the above salaries are payable from the Jefferson County General Fund, would such expenses comprise part of the \$7,500.00 maximum allowed to the Solicitor, after the Solicitor's Fund is exhausted?

"3. What is specifically meant by the following words which appear in Section 365 of Title 62, Code of 1940, relative to the commencing and stopping dates of the one year period: ' . . . provided that the amount so expended or drawn out of the General Fund of said county shall not exceed the sum of Seven Thousand Five Hundred Dollars in any one year.'

"4. Is the purchasing and maintenance of automobiles for use by the Solicitor's Office a legal expenditure from the Jefferson County General Fund without consideration of the \$7,500.00 limitation?

"5. Is the purchasing and maintenance of automobiles for use by the Solicitor's Office a legal expenditure from the Jefferson County Solicitor's Fund?

All five of your questions are closely related and deal in a general way with certain expenses relative to the conduct to the Solicitor's Office of Jefferson County. It is the law in Alabama that the Code of the State, adopted as was the present Code of 1940, is not a mere compilation of the laws previously existing, but is a body of laws, duly enacted, so that laws which previously existed cease to be law when omitted from the Code, and additions which appear therein become the law from the time the Code was adopted. *State v. Towery*, 143 Ala. 48, 39 So. 309; *Smith v. State*, 223 Ala. 347, 136 So. 270.

So far as I am able to determine the law, as relates to the Circuit Solicitor in Jefferson County, dealing with your questions is now found in Section 365, Title 62, Code of 1940, which reads as follows:

"§365. **Shorthand reporters.** The circuit solicitor of the circuit shall have the power and authority to employ all shorthand reporters necessary to properly report the proceedings before the grand jury and transcribe the same, and stenographer or stenographers for the office work of such solicitor, and fix the compensation of such reporter, stenographer, or stenographers, or other assistants, and such compensation shall be payable out of the general fund of said county upon warrants drawn upon the treasurer by the circuit solicitor in favor of such reporter, stenographer, stenographers, or other assistants as **hereinafter provided**. The circuit

solicitor shall have the power and authority to employ any assistants or assistance and to incur any expense he may deem necessary to properly administer justice, and such expense shall be paid out of the solicitor's fund of such county, provided there is a sufficient amount in said fund to pay said compensation or expenses at the time the same is due under the provisions of this subdivision; provided further, that if there is not sufficient amount in said solicitor's fund to pay such compensation or expenses at said time, the treasurer shall pay said amounts out of the general fund of said county, when authorized by the board of revenue, on the warrant drawn by the circuit solicitor, provided that the amount so expended or drawn out of the general fund of said county shall not exceed the sum of seven thousand, five hundred dollars in any one year. (1923, p. 200)" (Emphasis supplied)

The first part provides that the Circuit Solicitor of Jefferson County shall have the authority to employ shorthand reporters, stenographers or other assistants necessary for reporting and transcribing proceedings before the grand jury, and for office work of the solicitor, and that the compensation for such shall be payable out of the general fund of the county "as hereinafter provided." The latter part of the section authorizes the solicitor to employ any assistants or incur any expenses he may deem necessary to properly administer justice and that the expenses thereof shall be payable out of the solicitor's fund provided there is a sufficient amount in said solicitor's fund to pay such. It is further provided that if there is not a sufficient amount in said solicitor's fund to pay such compensation or other expenses that the treasurer shall pay said amounts from the general fund of the county but, under no circumstances, shall the amount expended from the general fund of the county exceed the sum of seven thousand five hundred dollars in any one year. The question arises as to what is payable from the general fund and what from the solicitor's fund, and it is apparent that the section is somewhat confusing in this respect. In addition the question arises as to whether any money can be drawn from the general fund before the solicitor's fund is exhausted. When a statute is ambiguous or doubtful in meaning, it should receive a rational and sensible construction in view of the purposes sought to be accomplished. *Birmingham Paper Co. v. Curry*, 238 Ala. 138, 190 So. 86; *Abramsam v. Hard*, 229 Ala. 2, 155 So. 590; *Mobile Liners v. McConnell*, 220 Ala. 562, 126 So. 626.

In view of the above authorities, it is my opinion, based upon a construction of Section 365, *supra*, that your question should be answered as follows:

1. The salary of the stenographers, shorthand reporters and other clerical assistants of the Solicitor of Jefferson County are payable from the general fund of the county.

2. The above named salaries which are payable from the general fund do not constitute any part of the sum not to exceed \$7500 in any one year, which may be drawn from the general fund of the county after the solicitor's fund is exhausted. In other words the county can draw from its general fund the amount of \$7500, annually to supplement the solicitor's fund from which other expenses are payable.

3. It is my opinion that the words, "in any one year," mean the year beginning with the term of office of the solicitor and ending on the same date

of the following year. The term of office of the circuit solicitor begins on the first Monday after the second Tuesday in January after his election, consequently the year herein referred to should begin on the first Monday after the second Tuesday in January, and run until the same date of the following year. This answer, in my judgment, is a practical solution to this matter and is in line with the following opinions of this office. Quarterly Report of Attorney General, Vol. XXII, Page 216; Quarterly Report Attorney General, Vol. XIV, page 249. Opinions of Attorney General 1936-38, page 597.

4. It is my opinion that the expenses of purchasing and maintaining an automobile for the Solicitor's office of Jefferson cannot be paid from the general fund of the county, as a primary claim against that fund.

5. It is my opinion that the latter part of Section 365, supra, is sufficiently authority of purchasing and maintaining automobiles for the solicitor's office, and that the expense thereof should be paid from the solicitor's fund, as supplemented, as provided for in said section. The latter part of this section authorizes the solicitor to incur any expense he may deem necessary for the purposes of properly administering justice and this may include the purchasing and operating of an automobile.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 10, 1942

Hon. S. E. Boozer,
Judge of Probate,
Calhoun County,
Anniston, Alabama.

Voting Machines — Election — Municipalities — Corporations —

1. Where voting machines have been adopted for use by a municipality, and the precinct in which such municipality lies has been divided into districts, one of which district lies without the corporate limits of the municipality, in State and County elections voting machines need not be used in that district which lies without the corporate limits of the municipality.

✓ 2. Where voting machines have been adopted for use by a municipality, and for any reason such municipality does not furnish voting machines for use in State and County election, then paper ballots may be used in such elections.

3. Where a voting machine has registered as many votes as such machine is capable of registering, and there is no other voting ma-

✓ chine at that particular voting place and no other machine is available, paper ballots may be used at such voting place for those voters who have not cast their votes on the voting machine.

4. Where an inadequate number of voting machines are furnished, the machines that are furnished should be installed and used in those precincts, wards, beats, or voting places having the largest number of registered voters, and in those voting places in which voting machines are not or cannot be supplied by reason of the fact that an inadequate number has been furnished, paper ballots should be used.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion, bearing date of April 3, 1942, is as follows:

"I would like to have your opinion on the following questions:

"1. Where a municipality by majority vote has authorized use of voting machines in a municipality, does the law require that voting machines be used in state and county elections in such municipality?

"2. If your answer to the above is in the affirmative, how does the county get machines from the municipality to be used in state and county elections in said municipality?

"3. If said municipality adopting voting machines is in one precinct of said county and there is a voting district of such precinct outside of said municipality, does the law require that voting machines be used in the district of said precinct outside of said municipality?

"4. If you hold that the burden is upon the municipality to furnish voting machines to be used within the municipality in state and county elections, and the municipality, for any reason, fails to furnish such machines, and such machines are not available for the election, may such election be held by the use of paper ballots as provided by law in those municipalities and counties which have not adopted the use of voting machines?

"5. In the event on any voting machine as many votes have been cast as such machine is capable of registering and there are more voters who present themselves at such voting place, may these voters who have not voted cast their vote by the use of paper ballots?

"6. If such municipality furnishes an inadequate number of voting machines for a county and state election within the municipality, is it permissible, under the law, for those voters that cannot be served through the voting machine to cast their vote on a paper ballot?

"7. If the municipality does not furnish a sufficient number of machines so as to have one machine for each six hundred registered voters in each voting place, may the machines that are furnished be used in those precincts having the largest number of voters, and paper ballots be used in those precincts having a small number of voters?"

"I desire to withdraw my request for official opinion under date of March 17, 1942, and substitute this request in place thereof."

Your first two questions have heretofore been answered by an opinion of this office to Hon. J. M. Wood, Chairman, Board of Revenue, Calhoun County, Anniston, Alabama, under date of November 3, 1941, Quarterly Report of Attorney General, Volume XXV, page 114, which help that where voting machines are adopted by the voters of a municipal corporation, and voting machines have been furnished by the municipal corporation for municipal elections, then voting machines must be used in all elections held thereafter in said municipality, including state and county elections the burden of furnishing such machines for use in all elections being on the municipality.

For your convenience, I enclose herewith a copy of the above referred to opinion.

My answer to your third inquiry is in the negative. It is my opinion that it is not necessary to use voting machines in that district of the precinct which is located outside of the corporate limits of the municipality in question. Where a precinct has been divided into districts, and one of the districts lies outside of a municipal corporation, which has adopted voting machines, then the law does not require that voting machines be used in that district.

Adverting now to questions 4, 5, 6 and 7, your attention is called to the pertinent part of Section 94, Title 17, Code of 1940, which is as follows:

"Upon the installation of voting machines in any voting place, the use of paper ballots therein shall be discontinued, **except as otherwise provided herein**. Wherever, by reason of any constitutional or other legal debt limitation, it shall be impossible for any county or municipality to provide voting machines by either rental, lease, or purchase for each election district, as provided herein, then it shall provide as many machines as it shall be possible to procure, and, as soon thereafter as possible, shall provide the remainder of such machines required hereunder. The machines so provided shall be first installed in wards or precincts or beats having the largest number of registered voters."

It will be noted from the above quoted excerpt from Section 94 that where voting machines have been installed in any voting place, then the use of paper ballots in such voting place shall thereafter be discontinued, except as is otherwise provided in the voting machine law (Code of 1940, Title 16, Chapter 1, Article 7.)

While I do not find any definite provision in the law which permits the use of paper ballots after voting machines are installed, in the event they are not furnished for an election by the authority charged with the duty of fur-

nishing the same, it is my judgment, from the context of the law as a whole, that, where this situation arises, then paper ballots shall be used, as though voting machines had never been adopted and installed, the above quoted excerpt from Section 94 to the contrary notwithstanding. ✓

Under the provisions of Section 340, Title 17, Code of 1940, primary elections must be held on the date set out in said section. Therefore, since a primary election must be held on the date provided by this section of the Code, I do not believe that the failure of the municipality to furnish voting machines for use therein would afford a basis for not holding the election on that date, by the use of paper ballots. The same is true as to general elections, as the dates for holding the same are also definitely fixed by statute. (Code of 1940, Title 17, Section 68).

In answer to your fifth inquiry, your attention is called to Section 110, Title 17, Code of 1940, which is as follows:

"§110. Repair of machine, or use of paper ballots.—If any voting machine being used in any election shall become out of order during such election, it shall, if possible, be repaired or another machine substituted by the authority holding such election, as promptly as possible, for which the county board or city commission may purchase, rent, or lease as many extra voting machines as they may deem necessary; but in case such repair or substitution cannot be made, paper ballots, printed or written, and of any suitable form, may be used for the taking of votes. In the event the use of paper ballots becomes necessary, as set out in this section, the authority holding such election shall provide a ballot box or similar appropriate receptacle for the deposit of the ballots, and such other supplies as may be necessarily incident to voting by paper ballot. In the event the use of paper ballots becomes necessary as hereinabove provided, such use of paper ballots shall be in all respects as required by law."

It is my judgment that insofar as this question is concerned, if a voting machine has registered as many votes as such machine is capable of registering, then under Section 110, supra, this machine would be considered out of order during the rest of the election, and paper ballots could be used as provided therein. The above answer is based on the assumption that there are no other voting machines at this particular voting place and no other machines available.

For the purpose of convenience, I will answer your sixth and seventh questions together. It will be noted from the provisions of Section 94, hereinabove quoted, that if an inadequate number of voting machines is furnished by the authority charged with the duty to furnish the machines, then the machines so furnished shall be first installed in the wards or precincts or beats having the largest number of registered voters.

In compliance with the provisions of the above quoted excerpt from Section 94, if a sufficient number of machines for the entire municipality are not furnished, I suggest that you install a sufficient number of voting machines in the larger voting places within the municipality, so as to eliminate the necessity for the use of paper ballots in those voting places. In those voting

places in which voting machines are not, or cannot be installed and used, for the reason that an inadequate number has been furnished, paper ballots should be used.

I do not deem it inappropriate to add that the duty is imposed upon you to make every possible effort to secure these machines from the custodian thereof, and it is likewise the duty of the custodian of the machines to deliver such machines to you.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 14, 1942

Hon. S. E. Boozer,
Judge of Probate,
Calhoun County,
Anniston, Alabama.

Code 1940, Title 11, Section 29; Title 47, Section 97 — Local Acts, 1935, page 269 — Judges of Probate — Photostatic copies — Fees —

Judge of Probate in county where he is on a salary basis and required to pay into the county treasury fees and allowances collected by him, attaching to the office, not authorized to furnish photostatic copy of instruments recorded in his office otherwise than upon payment of fifteen cents for each one hundred words of such copy.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for official opinion, bearing date of April 6, 1942, which is as follows:

"This office recently installed a Photostat Machine for the purpose of recording instruments filed for record in Calhoun County, Alabama.

"We have found that the machine fills a real need in this community, and the public is calling on us every day for reproductions of birth certificates, marriage license, and every imaginable kind of document. A reasonable charge for this service must, of course, be made as it takes some time to photostat and develop the instruments, but I doubt very seriously the fairness of the fixed charge of 15c per hundred words allowed by statute for copying and certifying instruments of record.

"This question has been raised by the Land Title Company, and I am writing to know whether or not the law requires me to charge for repro-

ductions at the rate of 15c per hundred words. This, of course, will make the work prohibitive and the Title Company cannot use the service. On the other hand, Mr. Young, the owner of the Title Company, takes the position that no where in the statute am I required to charge the statutory rate for duplicates. While I sympathize with his situation, it is most important to me that the examiners do not take a notion to tax me with the amount provided I give Mr. Young duplicates of all instruments filed for record.

"I am being pressed for a reply by Mr. Young, and while I feel that he is entitled to this service at a reasonable charge, I am unwilling to give it to him until I know where I stand. The same question arises on long instruments for the general public. For example, I may be requested to furnish a photostatic copy of a hundred page instrument. This I can do in a few minutes time, and it does seem unreasonable to insist on the fee fixed by the statute where there is **no certificate attached**. Of course, I know that if I certify the instrument the county is entitled to the statutory rate. My point is that the service will make money for the county, and pay for the machine in a short time.

"I would like for you to give me this information as soon as possible as I am having to charge Mr. Young at the rate of 15c per hundred words until I know positively what I can do."

Under Act No. 488, H-1065, approved September 13, 1935 (Local Acts 1935, page 269), the Probate Judge of Calhoun County is required to pay into the county treasury all fees, allowances and compensation attaching to his office and provided by law.

Among the fees, allowances and compensation aforementioned is a charge of fifteen cents for each one hundred words for recording deeds and other instruments required or authorized by law to be recorded, and likewise fifteen cents for each one hundred words for copying such instruments. Code 1940, Title 11, §29. Said §29 also provides a fee of fifty cents for each certificate with seal of office and a fee of twenty-five cents for each certificate without seal of office issued or executed by the Judge of Probate.

Thus it will be seen that separate fees of charges are previously provided for copying and for certificates where the copy is certified whether with or without the seal of office attached.

By Act No. 131, H-107, approved July 1, 1927 (General Acts, 1927, page 89) express provision was first made for the use of photograph or photostat machines for the purpose of recording conveyances of property and all other instruments authorized by law to be recorded in the office of the Judge of Probate. Code 1940, Title 47, §97.

Thus it appears that the record of instruments is now expressly authorized to be made by the use of photograph or photostate machines and by like reasoning it would seem that copies of such instruments are likewise authorized or contemplated by such means.

I am of opinion, therefore, in view of these express provisions of law that you are not authorized to furnish copies, whether such copies be photostats or otherwise, of any of the records of your office except upon the terms fixed by Title 11, §29, supra.

I am informed that this construction is in accordance with the administrative construction of the statutes in other counties where recording is now done by photostat machines.

I have come to this conclusion notwithstanding the statute whereby a county governing body is vested with the control of the county's property, (Code 1940, Title 12, §12, Subd. 1), in view of the fact that express stipulations of law must prevail over general expressions of authority.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 16, 1942

Hon. J. Lee Smith,
Judge of Probate,
Chilton County
Clanton, Alabama.

Elections — Primaries — Democratic Primary — Republican Primary —

A person may not participate in both a Democratic and a Republican Primary held at the same time.

Opinion my Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion, bearing date of April 14, 1942, is as follows:

"At the Primary Election to be held on next May 5th, there will be in Chilton County two parties participating, the Democratic party, and the Republican party and as you know, under the law, there will be separate election officials, election supplies, ballot boxes, and ballots for each party participating.

"Will you please advise me, therefore, if a voter has the right to vote both ballots? In other words, may a voter obtain a Democratic ballot and vote it and then a Republican ballot and vote this one, too? While the law to me is clear that a voter can only participate in one primary and vote one ticket, still there are a good many voters in this county who are

of the opinion that they have the right to demand and vote both ballots, and in past elections some have done this. There seems to be some confusion among some of the county election officers as to whether this can legally be done.

"I would like to have an opinion, therefore, from you to publish in the county papers, in order that the election officials and voters of the county may be informed as to the law, and I would appreciate it very much if you would give me your opinion in time that the same may be published in the county papers next week, which will be printed on Wednesday, April 22nd."

My answer to your inquiry is in the negative. Your attention is directed to Section 347, Title 17, Code of 1940, a part of the statutory law of this State dealing with primary elections, which reads in pertinent part as follows:

"§347. Who may vote in primary.—All persons who are qualified electors under the general laws of the State of Alabama, and who are also members of a political party entitled to participate in such primary election, shall be entitled to vote therein and shall receive the official primary ballot of that political party, and **no other**; *** ." (Emphasis supplied)

It plainly appears from the above quoted portion of Section 347 that **only** those persons who are members of a political party entitled to participate in a primary election shall be entitled to vote in such primary election, and that they shall receive the official primary ballot of the political party of which they are members, and **no other**. The language of this statutory provision is plain, clear, and unambiguous, and does not admit of any construction whatsoever other than the plain import of the language therein used.

Aside from the above, Section 347 further provides that every State Executive Committee of a political party shall have the right, power and authority to fix and prescribe the political or other qualifications of its own members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in its primary election. In compliance with, and under the authority of, this part of Section 347, the State Democratic Executive Committee of Alabama, under date of January 9, 1942, in a meeting held in Montgomery, Alabama, adopted a resolution calling the forthcoming Democratic Primaries to be held on May 5, 1942, and June 2, 1942. Paragraph 4 of said resolution reads as follows:

"4. That the following persons shall be entitled to vote in said Primary Elections, and none others, namely: Qualified white electors in this State who believe in the principles of the Democratic Party, and who agree and bind themselves by participating in said Primary, to abide by the result of said Primary Elections and to support the nominees of the Democratic Party therein, and that there shall be printed in plainly visible type at the bottom of each ballot prepared for said primary elections the following, to-wit:

"By casting this ballot I do pledge myself to abide by the result of this Primary Election and to aid and support all the nominees thereof in the ensuing General Election."

I do not have before me a copy of any resolution that might have been adopted by the Republican Executive Committee of Alabama, and do not know of any qualifications which they may have placed upon those persons entitled to participate and vote in any Republican Primary Election to be held in any county in Alabama. Whether or not the Republican Party of this State has adopted any such resolution is of no moment, for, certain it is, no person can participate in, and vote in, both a Republican and a Democratic Primary held at the same time.

The pledge set out in the excerpt from the resolution of the State Democratic Executive Committee hereinabove quoted is authorized by Section 352, Title 17, Code of 1940.

Premises considered, you are advised that it is my opinion that a voter may not participate in both a Democratic Primary and Republican Primary held at the same time, and if such person attempts to do so and secures and votes the ballot of both parties, he subjects himself to the penalty provided by Section 411, Title 17, Code of 1940, which is as follows:

"§411. Penalty for violation of provisions of chapter.—Any person who violates any of the provisions of this chapter for which a penalty is not otherwise provided, shall be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than fifty dollars and not more than five hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months at the discretion of the court."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 16, 1942

Hon. P. B. Traweek, Member,
Coffee County Board of Registrars,
Elba, Alabama.

~~Probation—Elections—Disfranchisement—~~

Probation granted to a person convicted of a felony does not restore his right to vote.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for an official opinion, bearing date of April 6, 1942, is as follows:

"We shall appreciate your opinion to our Coffee County Board of registrars (of which I am a member) on this proposition:

"C. M. Jacobs was a legal elector in this County; on November 18, 1940, he was convicted of a felony and sentenced to the Penitentiary; but on December 2, 1940, he was placed on probation for a term of 5 years. Later the Board of Registrars struck his name from the list of qualified voters on account of the conviction; and now Mr. Jacobs insists that the order of our Board striking his name was illegal, because he was under probation. If so, we would be willing to reinstate his name on the list of voters. Was our Board in error in striking his name, under the circumstances above outlined?"

It is my opinion that your inquiry should be answered in the negative. Code 1940, Title 17, Section 44 provides that the Board of Registrars, when purging the registration list, shall strike from said list the names of those who have been convicted of any offense mentioned in Section 182 of the Constitution of 1901. Section 182 of the Constitution of 1901 provides that persons convicted of any crime punishable by imprisonment in the penitentiary shall be disqualified both from registering and from voting. Code 1940, Title 17, Section 15 also provides that such persons shall be disqualified from registering and voting. Therefore, unquestionably, the person referred to in your inquiry was disqualified from voting by his conviction.

The question then arises whether or not the fact that he was placed on probation operates to restore to him the right to vote. Code 1940, Title 17, Section 16 is the only provision of the law dealing with restoration of citizenship that appears in the 1940 Code. This Section provides as follows:

"§16. Pardon restores citizenship and right to vote.—Any person who is disqualified from voting by reason of conviction of any of the offenses mentioned in section 15 of this title, except treason and impeachment, whether the conviction was had in a state or federal court, and who has been pardoned, may be restored to his or her citizenship with right to vote by the state board of pardons and paroles when specifically expressed in the pardon."

In an opinion of this office addressed to Mrs. Edwina Mitchell, Associate Member, State Board of Pardons and Paroles, under date of October 21, 1940, (Quarterly Report of Attorney General, Vol. XXI, page 68), wherein the following question was asked the Attorney General:

"May the Board of Pardons and Paroles order restoration of citizenship and relief from civil and political disabilities before granting pardon?"

it was held:

"Your fourth question involves two situations, viz., (a) may the Board order restoration of citizenship or other civil and political rights prior to the expiration of the maximum term for which the prisoner was sentenced, without granting pardon? and (b) may the Board, after the prisoner has been discharged by operation of law by the intervention of the expiration of the maximum term for which he was sentenced, restore citizenship and other civil and political rights of the convict without going through the formality of granting him a pardon? *** Consideration of these constitutional and statutory provisions excludes the idea that it was the intention, either in the Constitution or in the statute, that civil and political rights might be restored to a person convicted of an offense which had the effect of forfeiting his civil and political rights, before the prisoner had served his maximum sentence, without the intervention of a pardon. Cf. Opinions of the Attorney General, Office Edition, Volume IX, p. 30 (1932)."

A person convicted of an offense, and placed on probation as provided by Code of 1940, Title 42, Sections 19 through 26, nonetheless stands convicted of the offense. He must fulfill the conditions that the court sees fit to place on his probation, and, if he fails to do this, the court may revoke the suspension of his sentence and send him to the penitentiary. The granting of probation does not operate to suspend or reverse the conviction, but merely suspends the execution of the sentence in accordance with the terms of probation.

In the case of **Berman v. United States**, 58 S. Ct. 164, 302 U. S. 211, 82 L. Ed. 204, the Supreme Court of the United States said:

"Petitioner stands a convicted felon and unless the judgment against him is vacated or reversed he is subject to all the disabilities flowing from such a judgment. The record discloses that petitioner is a lawyer and by reason of his conviction his license was subject to revocation (and petitioner says that he has been disbarred) without inquiry into his guilt or innocence. *Re Ackerson*, 218 App. Div. 388, 392, 218 N. Y. S. 654. His civil rights may be determined solely by reference to the judgment.

"Placing petitioner upon probation did not affect the finality of the judgment. Probation is concerned with rehabilitation, not with the determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgment that has been rendered. Probation or suspension of sentence 'comes as an act of grace to one convicted of a crime.' *Escoe v. Zerbst*, 295 U. S. 490, 492, 493, 79 L. ed. 1566, 1568, 1569, 55 S. Ct. 818. The considerations it involves are entirely apart from any reexamination of the merits of the litigation. Probation was designed to 'aid the rehabilitation of a penitent offender;' 'to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable.' Thus probation cannot be demanded as a right. 'The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain.' *Burns v. United States*, 287 U. S. 216, 220, 77 L. ed. 266, 268, 53 S. Ct. 154. But if final judgment determining his guilt has been rendered, he still has the opportunity to seek by appeal a reversal of that judgment and thus to secure not an opportunity to reform but vindication."

In 24 C. J. S. "Criminal Law" Section 1618 (9), it is said:

"A suspension of sentence or probation order is tentative in nature and is in no sense a final judgment or sentence. It does not involve a reconsideration of the issues that have been determined, and does not constitute a part of, or affect or change the judgment or sentence that has been rendered. It merely suspends the execution of the sentence on accused's compliance with the terms or conditions imposed, and does not deprive the court of its jurisdiction over accused, and of jurisdiction to enforce the sentence or enter such lawful order as justice might require; nor does it suspend the operation of final judgment during the pleasure of the court or judge beyond the term of imprisonment fixed thereby. **Moreover, accused's civil rights are determined solely by the judgment of conviction, and, unless it is vacated or reversed, he is subject to all the disabilities flowing from such judgment.**" (Emphasis supplied)

Therefore, the premises considered, it is my opinion that the granting of probation does not operate to restore to a person his citizenship where the conviction is such as to deprive him of it.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 20, 1942.

Mrs. Louise Tribble, Register,
DeKalb County Circuit Court in Equity,
Fort Payne, Alabama.

Registers—Fiduciary Funds—Funds Arising from Sale—Costs and Fees—

Registers not entitled to commission for handling fiduciary funds where money is derived from sales by register.

Opinion by Assistant Attorney General Vardaman.

Dear Madam:

Your request for official opinion, bearing date of April 8, 1942, is as follows:

"Will you please advise me as to what commission (if any) is allowed to Registers for handling fiduciary funds. I have on hand in my fiduciary account, belonging to a certain estate, the sum of \$2,512.16, which has been held in this court for the purpose of reinvestment in a home-stead for widow and minors, and the payment of all further charges against the estate. This money was obtained from the sale of lands made

by a former Register, who received a commission on the sale. Would I, as Register or Commissioner, be allowed any commission for handling and paying out this money under decree of the Court and in the final settlement of this estate?"

It is my opinion that you are entitled to no fee or commission for handling and paying out the money in the above described situation. Code of 1940, Title 11, Section 27, which sets out the schedule of fees allowed to registers, provides in pertinent part as follows:

"Commissions on sales: For the first one hundred dollars, two percent; for all over one hundred dollars and not exceeding one thousand dollars, one and one-half percent; for all over one thousand dollars and not exceeding twenty thousand dollars, one percent; and for all over twenty thousand dollars, one-fourth of one percent. For receiving, keeping, and paying out or distributing money, **other than that arising from sales**, on the first one thousand dollars, one percent; on all over one thousand dollars and not over five thousand dollars, three fourths of one percent; on all over five thousand dollars, not exceeding ten thousand dollars, one-fourth of one percent; receiving, keeping and paying out money paid into court under a decree in favor of an administrator ad litem, one-half of one percent on the amount so received and paid out; *** " (Emphasis supplied.)

In an opinion of this office directed to Hon. J. H. Dobbins, Register, Circuit Court, Calhoun County, on July 19, 1941, Quarterly Report of Attorney General, Volume XXIV, page 49, it was held that the Register was entitled to the fee provided for by the second sentence of the above quoted excerpt of Title 11, Section 27, for receiving, keeping and paying out or distributing fiduciary funds. However, this opinion further says:

"Clearly, if funds of this nature **do not arise from a sale** or from a decree in favor of an administrator ad litem, which contingencies are specifically provided for, then they come within the provision of Title 11, Section 27, 'money other than arising from sales,' and the register would be entitled to the commission therein provided for receiving, keeping and paying out or distributing such money." (Emphasis Supplied.)

See also Biennial Report of the Attorney General, 1934-1936, page 459.

Therefore, it is my opinion that where the money is secured from the sale of lands made by the Register, then the Register or his successor would not be entitled to any further commission for receiving, keeping, paying out or distributing such money.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 20, 1942.

Hon. H. M. Brock,
Tax Collector,
Fayette County,
Fayette, Alabama.

Absentee Ballots—Primary Elections—General Elections—Special
Elections—Municipal Elections—

1. In all primary, general, special or municipal elections (except municipal elections in cities and towns whose population is less than ten thousand inhabitants) there should be appointed by the appointing board of the county or city, as the case might be, three managers or inspectors, two clerks and a returning officer, at the same time and in the same manner that other election officials are appointed by them, for the purpose of receiving the absentee ballots for such election from the judge of probate, or other person authorized to handle them, on the day of the election, tabulating the same, and announcing the returns thereof.

2. Absentee ballots for primary, general, special or municipal elections (except municipal elections in cities and towns whose population is less than ten thousand inhabitants) should be delivered on the day of the election by the judge of probate or other person authorized to handle them (in a primary election, the chairman of the political party holding the primary, or person acting in his stead) to such election officials, so appointed, rather than to the election officials of the various polling places at which the qualified electors voting the absentee ballots are entitled to vote.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of April 18, 1942, is as follows:

"Please give me your official opinion, at your earliest convenience, on the following question:

"Should the Chairmen of the County Democratic Executive Committees, or persons acting in their stead, in the various counties of Alabama deliver absentee ballots received by them in the forthcoming Democratic Primary elections to election officials of the so-called absentee ballot box for the same to be tabulated, etc., by them, or should they deliver said absentee ballots to the election officials of the respective polling places at which the qualified electors voting the absentee ballots are entitled to vote, for the same to be tabulated, etc., by them, along with other ballots cast in person at such voting places?"

Prior to 1933, in a primary election, the chairman of the county executive committee holding the primary election, or other authority as provided, to whom absentee ballots were returned by the persons voting the same, was required on the day of the election to deliver such absentee ballots to the officers of the election at the various voting places of the qualified electors voting the same, for the same to be tabulated, etc., by said election officials, along with other ballots cast in person at such voting places, in accordance with the pertinent provisions of Section 678 of the Code of Alabama, 1923, which were brought forward without change in legal effect as a part of Code of Alabama, 1940, Title 17, Section 418, which reads as follows:

“ *** The chairman of the county executive committee, or other authority as provided, shall deliver the same (the absentee ballot) on election day to the officers of election when and where said election officers shall open said envelope, and in the event the name of such absentee voter appears on the official list of qualified voters for said county and for said precinct or district, shall check his name off of such official voting list and cause the said ballot to be duly and properly recorded, *** .”

Section 683 of the Code of Alabama, 1923, which is brought forward without change in legal effect as Code of Alabama, 1940, Title 17, Section 423, also makes reference to the delivery of absentee ballots in a primary election to the respective polling places of the qualified electors voting the same. Both Sections 418 and 423, *supra*, had their origin in Act No. 75, H. 54, approved February 14, 1919, (General Acts, 1919, page 70).

However, on April 19, 1933, Act No. 178, S. 27, (General Acts, 1933, page 193) to further regulate the voting of absentee ballots in this state, became effective. Section 5 thereof provided that in all primary, general, special or municipal elections (except municipal elections in cities and towns whose population is less than ten thousand inhabitants) there should be appointed by the appointing board of the county or city, as the case might be, three managers or inspectors, two clerks and a returning officer, at the same time and in the same manner that other election officials are appointed by them, for the purpose of receiving the absentee ballots for such election from the judge of probate, or other person authorized to handle them, on the day of the election, tabulating the same, and announcing the returns thereof; and Section 6 thereof provided that absentee ballots for primary, general, special or municipal elections (except municipal elections in cities and towns whose population is less than ten thousand inhabitants) should be delivered on the day of the election by the judge of probate, or other person authorized to handle them (in a primary election, the chairman of the political party holding the primary, or person acting in his stead) to such election officials, so appointed, rather than to the election officials of the various polling places at which the qualified electors voting the absentee ballots are entitled to vote. These sections are brought forward, without change in legal effect, as Code of Alabama, 1940, Title 17, Sections 9 and 10, respectively, which read as follows:

“§9. Appointment of additional officers.—In addition to the managers and clerks now provided under the laws of this state for elections, there shall be, for all future elections, whether primary, general, special, or municipal, appointed at the same time and in the same manner by the

appointing board of the county or city, three managers, two clerks, and a returning officer, who shall meet in the office of the judge of probate of the county, (or, except in the case of municipal elections, in a place to be designated by the appointing board) on the day of said election and remain, as officers at other polling places, for the purpose of receiving the ballots of absentee voters from the judge of probate, or other person authorized to handle them, as provided herein. The absentee ballots cast as provided by law shall be, by said election officers specified in this section, tabulated separately by precincts, and returns thereof made as now provided by the laws governing the conduct of elections. The managers, clerks, and returning officer provided for in this section shall be governed in all respects in the performance of their duties by the laws governing all elections, and shall be subject to the same penalties as other election officers. Provided, however, that the officers appointed under the provisions of this section may begin tabulating said absentee ballots as soon as they are received by them from the person authorized to deliver same. Provided further, that this section shall not apply to municipal elections in cities and towns whose population is less than ten thousand inhabitants."

"§10. Delivery of absentee ballots to such appointed officers.—On the date of any general, special, or municipal election, as soon as the polls are open, the judge of probate, or person acting in his stead in the case of general or special elections, or the chairman of the political party holding the primary, or person acting in his stead in the case of primaries, or the mayor or other chief executive officer or person acting in his stead in the case of municipal elections, shall deliver all absentee ballots received to the election officers appointed under section 74 of this title; provided, that in municipal elections in cities and town of less than ten thousand inhabitants, such ballots shall be delivered to the election officers of the precincts of the respective voters. The said judge of probate, chairman of the executive committee of a political party holding a primary, mayor, or other chief executive officer (except in municipal elections in cities and towns of less than ten thousand inhabitants) shall, on the date of the election, deliver to the election officers of each polling place of the county or city, a list showing the names and addresses of each and every person whose name appears on the official list in such polling place or precinct, who voted an absentee ballot, and the election officers shall forthwith strike the names of all such persons voting absentee ballots from the regular poll list." (The reference in this section to "Section 74 of this title" is obviously an error, and should be to Section 9 of this title.)

These sections conflict with the above quoted provisions from Section 418, supra, and the reference in Section 423, supra, to the officer charged with the duty of delivering absentee ballots to the respective polling places of the qualified electors voting the same, and, therefore, it is necessary to determine which of said statutory provisions control.

I have set out the history of these statutory provisions hereinabove, and it appears from that history that Sections 9 and 10, supra, are later expressions of the legislative will (having first been enacted in 1933) than Sections 418 and 423, supra, (having first been enacted in 1919). In this situation,

Sections 9 and 10, *supra*, control over the above quoted excerpt from Section 418, *supra*, and the reference in Section 423, *supra*, to the officer charged with the duty of delivering absentee ballots to the respective polling places of the qualified electors voting the same. See *Steele v. The State*, 61 Ala. 213.

The premises considered, you are advised as follows:

1. In all primary elections there should be appointed by the appointing board of the county or city, as the case might be, three managers or inspectors, two clerks and a returning officer, at the same time and in the same manner that other election officials are appointed by them, for the purpose of receiving the absentee ballots for such election from the judge of probate, or other person authorized to handle them, on the day of the election, tabulating the same, and announcing the returns thereof.

2. Absentee ballots for primary elections should be delivered on the day of the election by the person authorized to handle them (the chairman of the political party holding the election, or person acting in his stead) to such election officials, so appointed, rather than to the election officials of the various polling places at which the qualified electors voting the absentee ballots are entitled to vote.

In fact, the provisions of Sections 9 and 10, *supra*, contain the presently applicable statutory law of this State as to all matters therein dealt with.

While your inquiry only deals with absentee ballots for primary elections, I deem it advisable to point out that the holdings herein announced are equally applicable to general, special or municipal elections (except municipal elections in cities and towns whose population is less than ten thousand inhabitants). This for the reason that Code of Alabama, 1940, Title 17, Section 58, which deals with general, special or municipal elections, and is comparable to Section 418, *supra*, which deals with primary elections, has a similar legislative history to Section 418, *supra*, and since Sections 9 and 10, *supra*, apply to general, special or municipal elections (except municipal elections in cities and towns whose population is less than ten thousand inhabitants) as well as to primary elections, they also control in this regard as to such elections over the provisions of Section 58, *supra*, which are comparable to the quoted excerpt from Section 418, *supra*.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 20, 1942.

Hon. A. S. Byars, Clerk,
Board of Revenue,
Lawrence County,
Moulton, Alabama.

Counties—Statute of Limitations—Claims against—

1. Where claim has been presented to Court of County Commissioners and disallowed by Court, same is barred by Statute of Limitations where suit is not commenced within three years after disallowance.

2. Court of County Commissioners may not pay claim against County under Section 110, Title 12, Code of 1940, as an equitable claim when such claim has been previously disallowed by Court of County Commissioners.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion, bearing date of April 16, 1942, is as follows:

"During the fiscal year, 1933-34, certain purchases were made from Lawrence County, without legal purchase orders. Payment on the above was refused by the former Commissioners Court.

"Now the above concern has rendered duplicate invoices to Lawrence County and ask that they be put in line for payment.

"Can we now approve and legally pay the above claims?"

My answer to your inquiry is in the negative.

It appears from the above request that this claim against your county accrued during the fiscal year 1933-34. It further appears that this claim was disallowed by the former Board of Revenue on the grounds that these purchases were made without legal purchase orders. This office has heretofore ruled that where claims against the county have been disallowed by the Court of County Commissioners, and suit is not brought thereon within three years, then such claim is barred by the statute of limitations. Quarterly Report of the Attorney General, Vol. XIV, page 275.

It might be argued that even though these purchases were made without a legal purchase order, they are equitable claims against Lawrence County and would be payable under the provisions of Section 110, Title 12, Code of 1940. The Supreme Court, in the recent case of *Rice v. Tuscaloosa County*, 4 So. 2d, 497, held that after a Board of Revenue had refused the payment

of a claim, then the provisions of Section 186 of the Code of 1923 had no field of operation, and such claim could not thereafter be paid under the provisions of Section 186, Code of 1923. Section 186 of the 1923 Code now appears as Section 110, Title 12, Code of 1940, and under the authority of the Rice case, supra, this claim could not be paid under this section of the 1940 Code.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 20, 1942.

Hon. Houston Cole,
Executive Director,
Alabama State Defense Council,
300 Dexter Avenue,
Montgomery, Alabama.

The Federal Laws, Orders and Rules Providing for Black-outs—

1. These provisions per se impose no new liability on sheriffs or municipalities nor do they confer any new exemptions.
2. In such cases the local laws control the duties and liabilities of such officers.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of April 8, 1942, is as follows:

"I have received the following letter from Mr. George Kramer, Chairman of the Cullman County Defense Council:

"Is the Sheriff protected under the Alabama law, in the event of damage suit against his official bond, on account of an act committed by an auxiliary deputy sworn in by him for Air Raid or Black-out service?

"It just strikes me that as a matter of information, and to satisfy the minds of all concerned, that it would be well to obtain an opinion from the Attorney General on this question and while the opinion is being obtained, same should also cover liability of Mayors and Chiefs of Police deputizing auxiliary police under the defense

setup, and all County Chairman as well as mayors of the different municipalities should have a copy of the opinion when same is rendered.

"Do not know whether this question is being raised in other communities, however am definitely of the opinion that sooner or later you will hear on this from other sections."

"I shall be glad to have an opinion from your office on this matter as soon as possible."

The proper answer to your questions as to the duties and liabilities of the sheriff and municipalities for acts of the sheriff's deputies and policemen during air raid practices, or what is known as "black-outs" involve a consideration of an Executive Order by the President of the United States, No. 8757, issued on May 20, 1941, United States Code Congressional Service No. 9, page 855, approved January 5, 1942; an Act of Congress approved January 5, 1942, United States Code Congressional Service 1942, No. 1, pages 18-19; and the general law of the State prescribing the powers, duties and liabilities of sheriffs.

The title to this Executive Order of the President is as follows:

"ESTABLISHING THE OFFICE OF CIVILIAN DEFENSE IN THE OFFICE FOR EMERGENCY MANAGEMENT OF THE EXECUTIVE OFFICE OF THE PRESIDENT."

This title is expressive of its purpose. The order makes reference to the order of declaration by the President of a National Emergency issued on September 8, 1939. The declared purpose is to assure effective coordination of federal relation with state and local governments engaged in defense activities, to provide for necessary cooperation with state and local governments in respect to measures for adequate protection of the civilian population in emergency periods, to facilitate constructive civilian participation in the defense program, and to sustain national morale. It establishes the office of Civilian Defense and provides for a director thereof and prescribes his duties at great length. It requires him, among other duties, to establish and maintain contact with state and local governments and their defense agencies and to assist them therein. The director is directed to invite the Council of State Governments and the American Municipal Association to cooperate.

When taken as a whole, the order simply seeks to unify the country through this governmental agency, the state and municipal governments into one coordinated body for the protection and defense of the whole country against impending dangers to person and property. So far as the states and municipalities are concerned, this participation is wholly voluntary. The binding force attached thereto rests solely on a sense of patriotic duty and principles.

The congressional act referred to is based on the presidential order above described and is intended to provide funds and supplies for the successful

and adequate protection of persons and property from the dangers of bombing attacks, sabotage or other war hazards. The act specifically provides:

"That nothing in this Act shall be construed as authorizing the director of Civilian Defense or any person or employee acting under him by authority of this act or in pursuance of the regulations prescribed thereunder to interfere with or usurp any of the rights or duties of any local district, municipal, county or state official."

It is manifest that neither this presidential order nor the act of Congress made any attempt to fix any new duties upon the sheriffs nor did it attempt to create any exemptions from the performance of existing duties and liabilities. The same is true as to municipalities.

The sheriffs' duties and liabilities are controlled by the state statutes and the decisions of our courts construing the same. The sheriffs' general duties are defined in Code 1940, Title 54, Sections 1 et seq. Subdivision 4 of Section 5 provides:

"It shall be the duty of sheriffs in their respective counties by themselves or deputies to ferret out crime, to apprehend and arrest criminals, and insofar as within their power to secure evidence of crimes in their counties, ***."

It may be that in the case of a "black-out," the circumstances may authorize or require the sheriff to appoint extra deputies or the cities might be required to add additional policemen to maintain law and order and protect the public on such occasions from danger to their person and property but the state law will govern in such cases.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 20, 1942.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Code 1940, Title 51, §§ 398, 399—Income Tax Exemptions—Autauga Cooperative Leasing Association—Code 1940, Title 10, § 168 (Code 1923, § 7046)

Corporation organized under Code 1940, Title 10, § 168 (Code 1923, § 7046) for the application of the cooperative plan in the rehabilitation of low income rural families in conjunction with the Federal Farm Security Administration, exempt from payment of State Corporation Income Tax.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion bearing date of April 3, 1942, which is as follows:

"In re: The Autauga Cooperative Leasing Association.

"An official opinion is requested relative to the status for income tax purposes of The Autauga Cooperative Leasing Association, whether taxable or exempt under one or more of the several provisions of Section 399 of the Code of Alabama, 1940. In order to place the case before you, we hand you attached hereto copies of the following:

"(a) Transmittal letter signed by Mr. Zeb Yelder, President, showing the association was organized February 28, 1940, under Section 7046, Code of Alabama, 1928 (Code of 1940, Title 10, Section 168).

"(b) The Declaration of Incorporation of the Association.

"(c) The By-Laws of the Association."

From the declaration of incorporation and the by-laws of the above named association it appears that it is essentially a cooperative association or corporation, operating in conjunction with the Federal Farm Security Administration, with the avowed purpose "to rehabilitate and render self-supporting the families of its members (rural families of low income) by assisting or participating in the establishment, development, and maintenance of farms, homes, and other facilities, including necessary or appropriate cooperative and community facilities and enterprises, for such families within the community at the Autauga Cooperative Leasing Association's farms, at Day's Bend, County of Autauga, State of Alabama."

It is without capital stock except such as arises from the payment of dues by its members or from contributors, loans or grants from the Federal Government. Its membership is confined to persons who may qualify by occupation of land, as licensees or leasees, belonging to the association or acquired or occupied by it in any way, with the approval of the Administrator of the Farm Security Administration, United States Department of Agriculture, subject to approval also of its Board of Directors, upon application thereto. The interest of its members in its property and affairs is evidenced by membership certificates, which are nonassignable and nontransferable except as provided in its by-laws. The surplus funds of the Association are required to be set aside as reserves at the end of each fiscal year "for extraordinary losses, for expansion, for any program of social welfare, education of the members, insurance, other developments for the benefit of the members through the cooperative movement, or for such other purposes as the Board of Directors may determine."

Under these conditions the problem is to determine, if I can, whether this association comes within any of the categories of exempt organizations enum-

erated in Code 1940, Title 51, § 399. Among organizations so exempt from payment of State income tax, I find: (1) "labor, agricultural or horticultural organizations; *** (4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of the association's welfare."

I am inclined to believe that this association, without doing violence to language, may be said to fall within the above quoted (4) or possibly within (1). At any rate, it is by no means the type of business corporation subject to the payment of income tax, and the statute, Section 399, *supra*, would seem to include this type of association or organization as one intended for exemption. Most certainly it falls within the description "cooperative association or corporation," (Code 1940, Title 10, § 168) and in former opinions of this office it has been ruled that such so-called cooperatives for the benefit of agriculture are exempt from the payment of state corporation income tax. See *Quarterly Report of Attorney General*, Vol. XXV, page 196, and *Quarterly Report of Attorney General*, Vol. X, page 118.

It is to be regretted that the exemption section of the state income tax law is not more definite and specific. In reaching this conclusion, I have endeavored to give some meaning, field of operation, and effect to the above quoted categories of exemption, albeit ambiguously and nebulously expressed.

I conclude, therefore, that the above named association is exempt from payment of the state corporation income tax.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 20, 1942.

Hon. L. Oliver Sanford,
Treasurer,
Tallapoosa County,
Dadeville, Alabama.

Tallapoosa County—County Treasurer—Section 211, Title 41, 1940
Code—Local Acts 1935, p. 19—

The Treasurer of Tallapoosa County cannot contract with the county for the job of issuing tractor fuel.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your request for official opinion, bearing date of April 7, 1942, which is as follows:

"I am County Treasurer of Tallapoosa County, and was elected by vote and am wondering if I could hold another office within the County.

"This office pays \$50.00 per month, and I can get the job of issuing out tractor fuel to the different districts at a salary of \$15.00 per month if it is lawful.

"I will appreciate if you will advise me I can hold this job too if I can get it."

It is my opinion that your inquiry should be answered in the negative.

I wish to call your attention to Section 211, Title 41, of the 1940 Code, which reads as follows:

"§ 211. County officers interested in county contracts.—Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract for work or services of the county, or is employed in any way under such contract, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers; but this section shall not be construed to prevent the court of county commissioners, board of revenue, county commission or other governing body of the county from employing as attorney to such governing body an attorney who holds an office which does not preclude him from practicing law and does not require his full time and for which, as such officer, he is compensated on a per diem or fee basis, nor shall it be construed to prevent the treasurer in lieu of a county depository from being employed as clerk to the court of county commissioners, board of revenue, county commission or other governing body of the county."

You will observe that under this provision of law and under Local Acts of 1935, page 19 authorizing the election of a county treasurer of Tallapoosa County, you are prohibited from having any kind of contract with the county, either for work or services.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 24, 1942.

Hon. Thomas A. Peavey,
Judge of Probate,
Escambia County,
Brewton, Alabama.

Elections—

1. Domicile of elector—question of domicile of elector in given precinct of county is a mixed question of law and fact.

Judge of probate, on timely application of elector, may correct the alphabetical list of qualified voters to show the actual domicile of the elector.

2. Applicant for absentee ballot, whose name is on the list of qualified voters of the county, is entitled to have the judge of probate forward to him such an absentee ballot. Said ballot, when cast by the absentee elector, may be challenged for cause as in other cases.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion dated April 20, 1942, as follows:

"1. Two parties formerly resided in District No. 10, Precinct No. 4 of this County. They registered there and became qualified electors of said District and later moved their citizenship to Precinct No. 3 and voted in the City of Brewton. These two persons are now working in the City of Montgomery and have requested that I move their voting records back to Precinct No. 4. They own a home there, have their furniture stored there and consider it their home.

"Have I the authority to make this transfer of their voting status back to Precinct No. 4? If so, should this transfer be made on verbal or written request? What should the request contain?

"2. Complaints have been registered (verbally) in this office against another voter of Precinct No. 4, who is duly registered and who qualified in that Precinct, and who subsequently lived in Precinct No. 3 and voted in the Brewton City Elections, however, he was never transferred to the latter Precinct in my office nor has he ever appeared on the list of qualified electors of any other precinct than No. 4.

"His poll tax has been paid from year to year in Precinct No. 4 and his sister has made and filed an affidavit in my office, setting up that Precinct No. 4 is the legal residence, home and voting place of said person. This man is now in the Army.

"The complainant contends that said voter is not a legal voter of Precinct No. 4 because he was requested to move his home from the residence of his sister and her husband in Precinct No. 4, and did leave there, living after such removal in the Town of East Brewton from about December, 1941 to February 10, 1942.

"Is this person entitled to vote in Precinct No. 4?

"3. Said person last above mentioned, has filed his written application in due form for an Absentee Ballot and the complainant mentioned herein, has filed his challenge of this voter's Absentee Ballot with me, setting up that said person is not a qualified elector of Precinct No. 4.

"Is there any provision of law for the challenge of Absent Voters? If so, to whom and how should a challenge be made? Am I prohibited under these circumstances from mailing said applicant an Absentee Ballot?"

As I understand your inquiry number one, the facts are that the two electors, dealt with in your request, formerly resided in District 10, Precinct No. 4, and were duly qualified as electors in said precinct and district; that subsequently they moved to Precinct No. 3, and their names were placed on the list of qualified electors for that precinct; that they have abandoned their domicile and residence in Precinct No. 3; that they now have their home and their furniture stored in Precinct No. 4 and that they hold to the bona fide intention of returning and taking up their permanent residence at their home in Precinct No. 4, although they are now temporarily residing in the city of Montgomery.

In my opinion, if they abandoned their domicile and residence in Precinct No. 3 and have held to the bona fide intention of returning to their home where their furniture is stored in Precinct No. 4 for more than three months next preceding the date of the primary election, they are qualified as electors in Precinct No. 4, insofar as residence is concerned.

Title 17, Section 12 of the Code of 1940, insofar as here pertinent, provides:

"§12. Qualification of elector to vote.—Every citizen of this state who is a citizen of the United States *** and who shall have resided in this state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote *** shall be an elector, and shall be entitled to vote at any election by the people."

Section 14 provides:

"§14. Elector changing precinct or ward.—Any elector who, within three months next preceding the date of the election at which he or she offers to vote, has removed from one precinct or ward to another precinct or ward in the same county, incorporated town or city, shall have the right to vote in the precinct from which such elector has so removed, if he or she would have been entitled to vote at such precinct but for such removal."

Section 17 provides in part:

"§17. Residence not acquired or lost by temporary absence.—No person shall lose or acquire a residence either by temporary absence from his or her place of residence without the intention of remaining *** without having acquired any other lawful residence, or by being absent from his or her place of residence in the civil or military service of the state, or the United States; ***."

So that, if they abandoned their domicile and residence in Precinct No. 3 more than three months immediately preceding the primary election date, and permanently re-established their domicile in Precinct No. 4 by holding to the bona fide intention to return to their home in that precinct where their furniture is stored, although they are temporarily absent from their domicile and temporarily are living in the city of Montgomery, they are entitled to vote in Precinct No. 4, insofar as residence in that precinct is concerned. If, however, the re-establishment of their domicile and residence in Precinct No. 4 has been less than three months prior to the date of the primary election, they are not qualified to vote in Precinct No. 4, but may vote in Precinct No. 3, under the provisions of Section 14, supra.

In **Pope v. Howle**, 227 Ala. 154, 149 So. 222, the Supreme Court, in considering the question of domicile of an elector, said:

"Domicile of the elector is a mixed question of law and fact, dependent upon the intention and acts of the elector. Cases illustrating such fact which may be consulted with profit are: In **Holmes v. Holmes**, 212 Ala. 597, 599, 103 So. 884, 886, the law of domicile is thus stated: 'A domicile once acquired is presumed to continue until a change, *facto et animo*, is shown. **Bragg v. State**, 69 Ala. 204. If there was a change, there must have been both an abandonment of his former domicile with no present intention to return, and the establishment of another place of residence with intention to remain permanently, or, at least, for an unlimited time; the former may be inferred from the latter. ***'

* * *

"The effect of these cases may be thus stated: When the fact of the legal residence of a citizen is once established, such fact of residence is presumed to continue, and this presumption prevails until it is established by the evidence that he has elected to or has established a residence at or in another place. It may further be stated that, while the determination of the place of legal residence of a citizen presents a question of fact, yet, in determining that fact, the intention of the citizen is entitled to and must be given due consideration in connection with his relevant acts. It is this combined result of intention and acts—speaking for the voter of his actual domicile, official residence as a citizen and as an elector, seeking to cast or undertaking to cast his vote—that determines the right to vote in such precinct."

In **Ex Parte Bullen**, 236 Ala. 56, 181 So. 498, the court again considered the question and said:

"It is a familiar principle of law as well as political economy, that, residence at a particular place with the intention to remain there for an unlimited time, as a permanent place of abode constitutes domicile. A man can have but one domicile at one and the same time, though he may have numerous places of residence. 'His place of residence may be, and most generally is, his place of domicile, but it obviously is not by any means necessarily so, for no length of residence without the intention of remaining will constitute domicile.' Webster's New Int. Dict. 659; *Lucky v. Roberts*, 211 Ala. 578, 100 So. 878; *Pope v. Howle*, 227 Ala. 154, 149 So. 222.

"'Domicile (once existing) continues until a new one is acquired.' *Talmadge's Adm'r v. Talmadge*, 1880, 66 Ala. 199; *State v. Judge of Ninth Judicial Circuit*, 13 Ala. 805."

And in *Wilkerson v. Lee*, 236 Ala. 104, 181 So. 296, the Court said:

"A voter having acquired a legal residence, been duly registered as a voter of the county and precinct or ward, and paid his poll tax therein for the year in which the election is held, may retain such residence until he has abandoned and removed therefrom with the intent to become a resident elsewhere. Temporary absence from one's residence for the purposes of his employment and the like, without the intent to abandon the home town and acquire a domicile elsewhere permanently, or for an indefinite time, does not forfeit his right to vote. *Pope v. Howle*, 227 Ala. 154, 149 So. 222; *Caheen v. Caheen*, 233 Ala. 494, 172 So. 618; 8 Alabama Digest, Elections, 264, Key No. 72.

* * *

"These instances illustrate the main questions presented in the case. The question of residence at the time of the election, or as affecting the payment of all past-due poll taxes, was the chief issue. The trial court in a carefully prepared opinion made a special finding as to the several voters brought into question on this appeal. Quite clearly he announced the correct rules of law touching residence of voters, and recognized the prima facie right of those shown on the official list of voters furnished the manager of election pursuant to law."

See also *Mitchell v. Kinney*, (Ala. Sup.) 5 So. 2d. 788.

Referring specifically to your inquiry as to your authority to correct the alphabetical list of qualified voters prepared by you, as relates to the voting status of the two electors, your attention is invited to Title 17, Section 38 of the Code of 1940, which reads as follows:

"§38. List of names registered by precincts to be published.—The judge of probate shall, from the registration lists heretofore and hereafter returned to his office, including those registered prior to January 1, 1902, and excluding those names stricken therefrom, as shown by the list returned to him under section 54 of this title, make correct alphabetical

lists of all electors registered by precincts and by districts of precincts, where precincts have been divided or subdivided, which list shall be certified by him officially to be a full and correct copy of the list of registered electors for each precinct, and where a precinct has been divided or subdivided, for each district of each precinct respectively, as the same appears from the returns of the registrars on file in his office. The judge of probate shall, after the first day of February of each year, compare such official list of registered electors with the poll tax lists which have been furnished him by the tax collector, and shall ascertain from such comparison the names of such persons on the official list of registered electors who have failed to pay any poll tax which is legally due, **and by such comparison and other available information**, such judge of probate shall make **correct** alphabetical lists of all of the qualified electors registered by precincts and by districts of precincts where precincts have been divided, and who have paid all poll tax due. Said lists so made up shall be published by him in some newspaper with a general circulation in said county on or before the fifteenth day of April, 1940, and of each two years thereafter, and together with said lists there shall also be published a certificate that said lists constitutes the correct list of all qualified electors who will be entitled to vote in any elections held in said county from the time of such publication until the first day of May of the next succeeding year, and also a notice that any voter duly registered whose name has been inadvertently or through mistake omitted therefrom and who has paid all poll taxes due and who is legally entitled to vote shall have ten days from said publication to have his or her name entered upon said list of qualified voters. **If within such ten days any voter shall reasonably satisfy said judge of probate by proper proof that any name should be added to such list, his or her name shall be added thereto.** An alphabetical list by districts and precincts of those so added within said ten days shall be prepared and published by said judge of probate in some newspaper with a general circulation in said county on or before the first day of May, 1940, and each two years thereafter. The alphabetical list of voters published by said judge of probate on or before the fifteenth day of April, **together with the names added and published on or before the first day of May**, shall be the official list of qualified voters in said county and for the districts and precincts therein for the next ensuing year, until a new list is published, and no person whose name does not thereon appear shall be allowed to vote nor shall he or she be allowed to vote except in the precinct, or if the precinct has been divided into districts, in the district in which his or her name on said list appears, unless such person complies with the qualifications prescribed by law for challenged voters, and the judge of probate shall deliver, or cause to be delivered, to the inspectors at each voting place in his county a list of said qualified electors immediately preceding every election or primary." (Italics supplied)

Construing the forerunner of this section (Section 387 of the Code of 1923), the Supreme Court in the case of *Malone, Judge of Probate v. Jones*, 219 Ala. 236, 122 So. 26, said:

"The name of E. N. Jones was omitted from the published list of qualified electors of DeKalb County in 1928, and he instituted mandamus proceedings to require the probate judge to enter his name thereon. Under

consideration of the cause for final hearing on proof, the court below granted the relief sought by the petition, and, from the judgment rendered, respondent has prosecuted this appeal.

"From the action of the court in overruling demurrer to petitioner's replication No. 1 to respondent's answer, it would seem the view was entertained that, as petitioner's name was on the certified list for the year 1926, and no change of status since said date, this fact was conclusive of his right to have his name upon the list for the year 1928. This view overlooks the express provisions of section 387, Code of 1923, **requiring the probate judge to make a correct alphabetical list of the qualified electors each two years by a comparison with the poll tax list and 'other available information,'** and very clearly under this statute, if petitioner's name should be found to have been erroneously placed on the list in 1926, **the error is subject to correction** in the list of 1928.

"This statute also provides for a publication of the list of qualified electors, duly certified, and with notice that any duly registered voter 'whose name has been inadvertently or through mistake omitted therefrom and who has paid all poll taxes due and who is legally entitled to vote shall have ten days from said publication to have his or her name entered upon said list of qualified voters.' The statute proceeds: 'If within such ten days any voter shall reasonably satisfy said judge of probate by proper proof that any name should be added to such list, his or her name shall be added thereto.'

"A clearly defined remedy is thus given the voter to have his name added to the list, with an equally clear expression that the burden is upon him to 'reasonably satisfy the judge of probate by proper proof' that he is entitled to such relief.

* * *

"Petitioner, seeking as here the enforcement of a private right as distinguished from a mere public duty on the part of the official, is required to first make a demand. *State ex rel. Davis v. Curtis*, 210 Ala. 1, 97 So. 291. But, in the instant case, a mere demand was not all that was required, for the statute prescribes that he must offer 'proper proof.'" (*Italics supplied*)

In my opinion, Section 33 of the Code, *supra*, authorizes the probate judge to correct the published alphabetical list of qualified electors, if he is reasonably satisfied by proper proof made by or on the authorized behalf of an elector, within ten days from the date of first publication of said list, so that the elector's name may be added to the published addition to the list of qualified voters for the precinct in which he is qualified to vote, and thereby be placed on and become a part of the "official list of qualified voters in said county and for the districts and precincts therein for the next ensuing year, until a new list is published." Unless satisfactory proof is made to the probate judge within ten days of the first publication, then the probate judge is not authorized to so amend the official list of qualified voters until after the election is held. If the elector, or some one duly authorized by him, fails to make the proper proof to the probate judge within the time allowed,

he must comply with the requirements prescribed for challenged voters, in order to vote in the precinct where he is a legally qualified elector. Of course, he cannot legally vote in any other precinct.

The fact that the elector has made satisfactory proof to the probate judge of a bona fide change of domicile from one precinct to another within the county ought to be brought to the attention of the Board of Registrars of the county in time for the said Board to take the necessary action, at its next meeting held to make up an official or supplementary registration list, (Code of 1940, Title 17, Article 3) to amend the registration list to show the change of precinct of domicile of the elector.

I do not think that any particular formality must be observed by the elector in requesting that the alphabetical list of qualified electors be corrected to show the precinct of his true domicile. Whether the request is made orally or in writing,—if you are satisfied as to the facts—, you may act in the premises.

The answer hereinabove to your first inquiry also suffices as an answer to your second inquiry.

If the elector actually has his domicile now in Precinct No. 4, he is entitled to vote in that precinct. This is a question of fact for you to determine by application of the rules laid down in the cases quoted from, *supra*.

I think that in arriving at a conclusion, you can give such weight as you think proper to the affidavit which was filed with you on the elector's behalf by his sister.

Answering your third inquiry, I am of the opinion that in the name of the applicant for an absentee ballot is on the official list of qualified voters of the county, as a qualified voter thereof, it is your duty to forward to him a ballot upon his due application therefor, as is provided in Sections 57 and 58 of Title 17 of the Code of 1940.

No candidate or elector has a right to successfully challenge or protest your action in **forwarding a ballot** to such a person who duly and legally applies therefor. Of course, the ballot, **when cast by the elector** as an absentee ballot, may be challenged, in the manner provided by Section 58, *supra*, in substantially the same way that ballots cast by electors who are actually present at the several polling places are challenged, with such obvious modifications as the exigencies of the situation (the physical absence of the elector from the polling place) will demand.

The elector who casts an absentee ballot, being absent from the polling place at the time his ballot is challenged, cannot, of course, have the time or the opportunity to make the "oath of challenged voter" or procure the "oath to establish identity of voter" required by Article 12 of Title 17, Code of 1940. **But the oath of the absent voter and the jurat of identity by the officer administering to him the oath, required by Title 17, Section 62, serve substan-**

tially the same purpose. As noted by the court in *Mitchell v. Kinney*, supra:

“* * * it is the established policy of the state that a person be not disfranchised as to his right as an elector or denied in the privilege to hold office when he has made an honest effort to comply with the law and in that effort has substantially complied with the statutory mandates. *Garrett v. Cuninghame*, 211 Ala. 430, 100 So. 845; *Campbell et al. v. Jefferson County*, 216 Ala. 251, 113 So. 230.”

This opinion is directed to the narrow question presented in your inquiry, and the conclusions herein stated must not be taken as applicable to the question of whether or not the probate judge can amend the registration lists prepared by the County Board of Registrars. No opinion is here expressed on that question.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 1, 1942

Board of Revenue of Barbour County,
Eufaula, Alabama.

Counties — Authority —

Counties have no authority to pay claims incurred by virtue of an order of the judge of the circuit court to make examination of the physical ability of a defaulting witness to attend court.

Opinion by Assistant Attorney General Callahan.

Gentlemen:

Your request for official opinion, submitted by your attorneys, bearing date of April 13, 1942, is as follows:

“We write you at the instance of the Board of Revenue of Barbour County for an opinion relative to the payment of a claim filed with this Board of \$7.50. One Middlebrooks was charged with disposing of or selling property on which there was a mortgage, and one Pat Burke was a State witness — who claimed he was ill and too sick to attend Circuit Court, on the trial of the case. The trial judge ordered Dr. J. S. Tillman of Clio, Alabama, to make a professional visit to the home of said Pat Burke and ascertain whether or not said Burke was too sick to appear in our Circuit Court at Clayton Division as a witness.

“Tillman made the visit on order of the court, and files a bill with the County for professional service for mileage 8 miles and return for examination of said Pat Burke to the amount of \$7.50.

"The Board would be glad for advice as to whether or not it could pay this claim."

It is well settled law in this jurisdiction that all the powers which the counties are entrusted are the powers of the state, and that the duties with which they are charged are the duties of the state. Whatever of power a county possesses or whatever of duty it is required to perform originates in the state creating it. **Askew v. Hale County**, 54 Ala. 639; **Rhodes v. Marengo County**, 205 Ala. 667, 88 So. 850; **Tuscaloosa County v. Alabama Great Southern R. R. Co.**, 227 Ala. 428, 432, 150 So. 702; **Mobile County v. Williams, Judge**, 180 Ala. 639, 61 So. 963.

A careful examination of our statutes fails to disclose any authority delegated to a county to pay such a claim as is described in your letter. **Naftel v. Montgomery County**, 127 Ala. 563, 29 So. 29. This is to be regretted for it has been the practice and custom of the judges of the circuit courts for generations to make similar orders to the one here involved.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 1, 1942

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Where the sheriff or other designated person is ordered to transfer an insane patient to the insane hospital of Alabama, the expenses of the trip would be calculated from the place from which he began the trip, even though he had to travel some distance before reaching the place where the patient is picked up.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 21, 1942, in which you request my opinion as follows:

"I take notice of rulings of your office, volume 22, page 41 and volume 14, pages 31 and 73, in which you hold that the pay of the sheriff or other party carrying insane patient to an insane hospital should be only from the county jail to the hospital and return. But it seems to me that your discussions as well as the questions asked of you in these cases are on the theory that the patient is already in jail when the Probate Judge makes the decree of insanity and issues commitment, and

that also you have in mind the distinction between sections 1445 and 7287, Code of 1923.

"But will you please consider for me and advise me your opinion in cases where the patient is never brought to the courthouse or jail at all.

"Under section 1444 you will note that the court may make a decree of insanity and issue commitment to a hospital with or without the patient being present in court. It so happens in this county that in a great majority of cases the patient is never brought to jail. In most cases where it can be avoided we deem it improper to do so, not only because he destroys beddings and other property in the jail and entails the expense of feeding and sometimes a special guard, but also because relatives wish to avoid such embarrassment if they can at all control him in the home. It is often necessary therefore to send the Sheriff to the home for the patient and directly from there to the hospital. Sometimes because the family needs the assistance of the sheriff in handling the patient, and oft times in the case of indigents because the family has no conveyance.

"Unless we can pay the sheriff this traveling expense it could many times happen that he will be dilatory and negligent in performing this duty with possible undesirable consequences.

"Please advise me therefore where the decree of the court is previously made and when in the judgment of the court it is necessary to send the sheriff directly from his home (which in this county is the jail) to the home of the patient and from there to the hospital, the county may pay the entire traveling expense of the trip. Also where the court appoints a member of the family to carry the patient, are we required to limit his expense to the distance from the jail, or may we pay the expense from his home. Is not section 1445, Code of 1923, broad enough to cover the entire traveling expenses in cases and under conditions outlined above as it says the county must defray all necessary expenses.

"Please give me an early opinion as the examiners are now considering such cases in this county."

I see the problem you have. The opinions you refer to were written with the idea that the patient being conveyed to the hospital was confined in the county jail and, of course, in this instance, the expenses of the trip would have to be calculated from the county jail. But where the patient is not confined in the jail, it is my opinion that the expenses of the trip would have to be calculated from the place from which the sheriff or other designated person starts, even though he may have to go some distance to pick up said patient. I think that this is provided for under Title 45, Section 211, Code of Alabama, 1940, which is as follows:

"§211. Conveying patient to hospital.—The judge of probate shall depute one or more persons, relatives, friends, or officers, as he may see fit, to convey the patient to the hospital, and all necessary expenses incurred

in conveying an indigent patient to the hospital shall be paid out of the county treasury on order from the county commissioners."

Certainly going from his home or office to the place where he picks up the patient would be an expense of transporting the patient to the hospital.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 4, 1942

Miss Helen Lonnergan,
Register, Circuit Court,
St. Clair County,
Ashville, Alabama.

Fees and Costs — Registers —

Where the register makes a sale under orders or decrees of the circuit court, sitting in equity, he is entitled to his commissions as provided for in Code 1940, Title 11, Section 27, regardless of who were the purchasers at said sale or whether the purchase money was actually paid to the register, or credited on the debt due the purchaser.

Opinion by Assistant Attorney General Callahan.

Dear Madam:

Your request for official opinion bearing date of April 29, 1942, is as follows:

"Will you kindly give me a ruling on the following?

"In an Equity case where the Register makes a sale of land to satisfy a mortgage and the person to whom the mortgage is made buys in the land, but does not pay the purchase price in to the Register, is the Register entitled to the fee, or commission on sales, as provided under Section 7283, Articles 1 and 2 of Chapter 350? Since there is no other provision for fee for making sales, is this section applicable to all purchase prices regardless of whether the money is actually paid in to the Register?"

The Code of 1940, Title 11, Section 27, answers your question. The section opens up in this language:

"Registers are entitled to the following fees for the following services:"

Then follows a long list specifically cataloguing the items and the fees for services rendered. In the midst thereof we find the following:

"Commissions on sales: For the first one hundred dollars, two percent; for all over one hundred dollars, and not exceeding one thousand dollars one and one-half percent; for all over one thousand dollars and not exceeding twenty thousand dollars, one percent; and for all over twenty thousand dollars, one-fourth of one percent."

There is no ambiguity in this language. It definitely and in detail fixes your compensation for sales made under orders and decrees of the circuit court, sitting in equity. The statute is not concerned with the bidders or purchasers at such a sale. The right to this fee hinges on whether or not you made a sale under such orders. This is true although the purchase money is not actually paid to the register but, instead, is credited on the debt due the purchaser. This is so self-evident that it is unnecessary to cite any authorities.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 7, 1942

Hon. Isaac Johnson, Jr.
Judge of Probate,
Lawrence County,
Moulton, Alabama.

Code 1940, Tit. 51, §618 — Deed Filing Tax — Defense Plant Corporation — Assignment of Leases —

1. The deed filing tax is not payable upon an instrument offered for record evidencing transfer or assignment to Defense Plant Corporation, a federal governmental agency, of an agreement or lease previously executed by the assignor and another, which at the time of execution would be, if offered for record, subject to such tax.

2. Such tax, however, is due to be paid, upon offer for record, by Defense Plant Corporation of a lease or agreement previously executed and thereafter assigned to it, provided at the time of execution thereof such an agreement or lease was subject to said filing tax.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion bearing date of April 24, 1942, which is as follows:

"I am enclosing herewith a lease agreement by and between J. E. Sims and Southern Aviation Training School, Inc., together with an assignment of this lease to Defense Plant Corporation. Ordinarily there would be a deed tax on such an instrument, but since this is Federal business, I just wondered if it would be charged on such instruments. If the tax is chargeable, would both instruments be charged? The regular lease does not give any consideration, but is on the same property and we assume that the consideration would be the same.

"We shall appreciate an early opinion on this as they are anxious to get it back, but since the tax was so much, we thought we should get an opinion on it before going ahead with it."

From the papers submitted for examination it appears that on October 14, 1941, Elizabeth Grayson and Ella Kirk Baker leased to Southern Aviation Training School, Inc., an Alabama corporation, 210 acres of land in Lawrence County, Alabama, for use as an aviation field, for a term of three years beginning January 1, 1942, at an annual rental of \$2100 with the privilege of renewal for successive terms of one year, and with certain covenants not material for the purposes of this opinion.

On the same date, with the consent of lessors, the lessee entered into an agreement with J. E. Sims whereby the latter leased for farming purposes for a term of three years, beginning January 1, 1942, all of the land above referred to not used as an aviation field upon an annual rental of \$5 per acre, the acreage to be determined by a survey and thereafter readjusted as occasion might require.

So far as appears neither of the aforementioned instruments was filed for record in the Probate office and, of course, no filing tax has been paid with respect to either of them.

On February, 20, 1942, it further appears, Southern Aviation Training School, Inc., by instrument in writing, transferred and assigned to Defense Plant Corporation, a federal governmental agency, organized and controlled by Reconstruction Finance Corporation, the aforementioned agreement executed by itself and said Sims, in consideration of payment to itself of \$246,-230.00 by Defense Plant Corporation.

Defense Plant Corporation, by Act of Congress, approved June 10, 1941 (55 Stat. 248) is expressly exempted from payment of all taxes except state and county and municipal ad valorem tax upon its real estate. 15 U. S. C. A., 1941 Cumulative Pocket Part, page 94, § 610.

It follows, therefore, that no deed filing tax is payable with respect to the aforementioned assignment of February 20, 1942.

A different question is presented, however, as to filing tax due to be paid upon the record of the agreement above referred to, executed October 14, 1941 by Southern Aviation Training School, Inc., and J. E. Sims. In an opinion rendered by this office, April 16, 1936, to Hon. Matt A. Boykin, Probate Judge of Mobile County, **Biennial Report, Attorney General, 1934-1936**, page 632, it

was ruled that whereas the filing tax was not payable with respect to an assignment to a governmental agency, to wit, a national bank, yet the tax was due to be paid with respect to an instrument which had been previously executed and was at the time of execution subject to the tax, although the same might be offered for record by the governmental agency.

The reasoning upon which this ruling is rested, and which I believe is sound, is best expressed by quoting a paragraph from the opinion itself, on page 634, reading as follows:

"At the time of the execution of the conditional sale contract here under consideration, no Federal Agency being interested or involved, it was not, within the classification laid down by the Supreme Court of the United States, 'such an instrument as the registration tax was not at liberty to reach.' The National Bank which obtained it as assignee took it with full knowledge that the mortgage tax levied thereon was due and would have to be paid if and when the same was offered for record (*Federal Land Bank v. Crossland*, 67 L. ed. 705). Under such circumstances, the collection of the registration tax is not in fact taxing an instrumentality or an agency of the United States, but is taxing an instrumentality of such agency's assignor. I can see no logical distinction between requiring a National Bank to pay the registration tax due upon an instrument at the time the Bank acquires title thereto, when offered for record, and requiring such bank to pay ad valorem taxes on personal property when such taxes are due and unpaid at the time the Bank acquired title to the said personal property."

You are therefore advised as follows: (1) The deed filing tax, Code 1940, Title 41, §618, is not payable with respect to the assignment executed February 20, 1942, by Southern Aviation Training School, Inc., to Defense Plant Corporation; (2) said tax, based on the value of the interest conveyed at the time of the conveyance, is however, payable with respect to the lease or agreement thereby transferred and assigned, when the same is offered for record; and (3) would, of course, likewise be payable with respect to the lease executed by Elizabeth Grayson and Ella Kirk Baker on October 14, 1941, to Southern Aviation Training School, Inc., should it be offered for record either by Defense Plant Corporation or otherwise.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 8, 1942.

Hon. William A. Conrad, Clerk,
Circuit Court,
Mobile County,
Mobile, Alabama.

Mobile County—Local Acts 1932, Extra Session, page 108—Code of 1940, Title 11, Section 22; Title 13, Section 198 (16)—Clerk of Circuit Court—Fees and Commissions —

1. Clerk of Circuit Court of Mobile County is required to pay into the county treasury the 5% fee or commission authorized to be deducted from money collected by him for the State and county pursuant to Code 1940, Title 11, Section 22 and Title 13, Section 198(16).

2. Said clerk is not authorized to hold for his own account any money so deducted as fees or commissions.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of May 4, 1942, is as follows:

"Please permit me to respectfully request that you refer to your opinion rendered September 16, 1940, to Hon. Fred H. Price, Clerk Circuit Court, Autauga County, Prattville, Alabama, as set out in Quarterly Report of the Attorney General of Alabama Vol. 20, page 284, and Supreme Court Decisions supporting same; also,

"Local Acts of Alabama Extra Session 1932, Page 108 (No. 260)—(H. 649); also,

"Title 13 Section 198 Sub-section 16 Code of Alabama 1940; also,

"Act No. 577 approved July 28, 1931, General Acts of Alabama Page 669.

"After reviewing the above, please be so kind as to give me your official opinion on the following questions, viz:

"1. Am I or not required to pay into the County Treasurer the 5% commissions allowed by the Statutes to Clerks of the Circuit Courts on monies collected for the State and the County?

"2. In view of the fact that the law appears to me to be silent as to who is legally entitled to said commissions and also, in view of the fact as far as my finding goes all other counties in which officials have

been placed on salaries the same was done in lieu of all fees, commissions, allowances and other compensation, would I or not be legally permitted to retain as my own said commissions?"

Act No. 577, S. 291, approved July 28, 1931, (General Acts 1931, page 669) provides that "the clerks and registers of the several circuit courts of the State of Alabama shall receive five percent of any sum or sums collected by such clerk or register for the State of Alabama, as compensation for the collection and remittance of the same, the said percentage to be deducted by such clerk or register making the collection from such sum or sums so collected."

Said act now appears in the Code of 1940, under Title 11 relating to Costs and Fees, as Section 22 of Chapter 1, Article 2, Subdivision 2, without change and is immediately preceded by the caption, "Fees of Clerk and Register for Collection of Money."

Thus it appears that upon codification of the Code the Code Commission considered the percentage referred to in the act of July 28, 1931, *supra*, as a fee. And it is to be noted also that said act, as codified, immediately follows Section 21 of said Title 11, which specifically enumerates various "fees allowed to Clerks of circuit courts." In other words, the act of July 28, 1931, while not expressly purporting to be an amendment of the schedule of fees allowed to clerks of circuit courts under Section 7278 of the Code of 1923, in effect amounted to an amendment in that it enlarged and extended the fee schedule.

In an opinion of this office dated September 16, 1940, addressed to Hon. Fred H. Price, Clerk of Circuit Court, Autauga County (Quarterly Report, Attorney General, Vol. XX, page 284), a distinction was drawn between the percentage above referred to and fees; and on the basis of such distinction it was ruled that the percentage, therein denominated a commission, was not a fee, and that, therefore, the Clerk of the Circuit Court of Autauga County, as Clerk *ex officio* of the Inferior Court of said county, was not entitled to such percentage or commission as a part of his compensation for services as Clerk *ex officio*.

Whether the distinction as there applied is sound it is unnecessary to decide at this time. At any rate, for the purpose of answering your questions, I do not think that said opinion is now material.

Act No. 260, H. 649, approved November 8, 1932 (Local Acts 1932, Extra Session, page 108) provides that certain officers of Mobile County, Alabama, including the Clerk of the Circuit Court, "shall receive compensation for public services performed on a salary basis."

In Section 2, said act further provides that the Clerk of the Circuit Court shall pay into the county treasury of Mobile County,

" *** all fees, fines and forfeitures collected or received," by him "during the month or part thereof next preceding the date of such payment or settlement."

Under Section 6 of said act the Clerk of the Circuit Court is paid an annual salary of \$4800 and is authorized to employ certain assistants within limits therein specified.

Under Section 8 of said act the salaries of the Clerk and of such assistants are payable out of the County Treasury of Mobile County in monthly installments.

One of the duties of clerks of the circuit court is

" *** to render to the County Treasurer *** as of December thirty-first and June thirtieth, of each year, a statement in writing and under oath, of the fines assessed and forfeitures obtained during the preceding six months, *** and also what money they have received for the county, *** and, after deducting from such amount five percent for their compensation, they must pay the balance to whomsoever is custodian of the county funds." Title 13, Section 198(16), Code of 1940.

Thus it would seem that ordinarily the five percent allowed to the clerk for collection and remittance of State and county funds under the two statutes above referred to is regarded as compensation, whether such compensation be called fees, commissions, allowances, percentages or what not.

It is equally clear, I believe, that the fundamental purpose of the act of July 28, 1931, placing certain officers in Mobile County on a salary basis, was to substitute a salary for compensation for all their services as such public officers, theretofore paid by way of fees or commissions. In this connection, it will be well to quote from **Crook v. Commissioners Court of Calhoun County**, 144 Ala. 505, 507, 39 So. 383, as follows:

"The natural import of words is their literal sense, but this may be varied to give effect to the fundamental purpose of the statute and the mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute."

You are therefore advised as follows:

(1) You are required to pay into the County treasury the five percent authorized to be deducted from moneys collected by you as Circuit Clerk of Mobile County for the State and county pursuant to Code 1940, Title 11, Section 22 and Title 13, Section 198(16); and

(2) You are not, therefore, legally authorized to retain such percentages, commissions or deductions for your own account.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 8, 1942.

Hon. Ervin E. Dunn,
Judge of Probate,
Wilcox County,
Camden, Alabama.

Code of 1940, Title 51, §618—Deed Filing Tax—Oil and Gas Leases
—Extension Agreement—

1. Where deed filing tax was paid on an oil and gas lease conveying the oil and gas interest in lands for a period of one year, with provision for extension at the option of the lessee of the land for another year and, prior to expiration of the first year, the lessor waived payment of the rent for the second year and executed another instrument purporting to convey to the lessee the oil and gas rights for an additional term of eight months, the latter instrument is subject to the deed filing tax.

2. The amount of such deed filing tax is measured by the value of the interest conveyed by the extension agreement to be determined by the judge of probate.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of April 17, 1942, in which you request my opinion as follows:

"Enclosed herewith are copies of instruments presented at this office for record. The oil and gas lease was presented on or about August, 1940, and the Extension Agreement on or about April 15.

"On the oil and gas lease deed tax was charged, but the party presenting the Extension Agreement argues that there should be no tax on it

"Please look over the instruments, and advise if there should be deed tax on the Extension Agreement, and if so, on what basis."

The instrument above referred to as the "oil and gas lease," of which you have forwarded a copy, is dated August 26, 1940, and purports to convey to the lessee the oil and gas rights and interest in 940 acres of land for the term of one year. Said instrument provides that unless the lessee, before the expiration of the term, shall pay a rental of 25c per acre for the next succeeding year the lease shall terminate.

Apparently such rental was not paid before the expiration of the first year and shortly before that date the lessor, on August 12, 1941, executed another instrument, which you have enclosed for examination, whereby lessor upon a recited consideration of one dollar, agreed that the lessee might con-

tinue for a term of eight months to enjoy the rights and privileges conveyed to him by the original lease.

The original lease, as I see it, operated to convey the oil and gas rights to the lessee for a term of one year only and the remaining provisions constituted an option merely, under which the lessee, if he elected to do so, might obtain the oil and gas rights for an additional year upon payment of the rental aforesaid.

I am of the opinion, therefore, that the second instrument above referred to as the extension agreement is in legal effect a new lease.

The deed filing tax, therefore, payable upon the record of the so-called extension agreement pursuant to Code 1940, Title 51, §618, is to be measured by the value of the right or interest so conveyed. I regret that I am unable to aid you in any way in arriving at the value of such interest. The is entirely a question of fact to be determined by you from such evidence or information as you are able to obtain. The duty is placed squarely upon you to determine such value. **Long v. Jasper Land Company**, 217 Ala. 593, 117 So. 210; **Biennial Report of Attorney General**, 1936-1938, page 622. I am returning the papers.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 28, 1942.

Hon. Allen Stewart, Sheriff,
Autauga County,
Prattville, Alabama.

Sunday Laws—Operation of moving picture shows in cities whose population is less than fifteen thousand inhabitants not prohibited by Title 14, Section 421, Code of Alabama, 1940.

Lotteries—"Bank Night" scheme held to be lottery.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your letter of May 11, 1942, in which you request an official opinion, is as follows:

"Re: Title 14—Section 421 Code of Alabama, 1940:

"Will you please give me an opinion on the Section above referred to, and advise me if it is lawful to operate a moving picture show in Prattville, A City of Less than 15,000 on Sunday.

"The question is up here, and I will thank you very much if you will kindly advise me if a Moving Picture Show may be lawfully opened on Sunday.

"Then, again, at our local moving picture show they have 'Bank Nights,' and on these nights they give away Money, each person buying a ticket to the show is given a number, and the numbers are drawn from a box, and the lucky number wins the money. Is that within the law, or is it a lottery? Please advise me."

It is my opinion that Title 14, Section 421, Code of Alabama, 1940, does not prohibit the operation of moving picture shows on Sunday in cities whose population is less than fifteen thousand inhabitants.

Section 421, *supra*, provides as follows:

"§ 421. Sunday baseball, moving pictures, etc.—Any person or persons who play or engage in the playing of any baseball, or football, tennis, or golf on Sunday, in any public place or places where people resort for such purpose, shall be guilty of a misdemeanor, and shall be fined not less than twenty-five dollars nor more than fifty dollars. Provided, that it shall be lawful in cities whose population is not less than fifteen thousand inhabitants nor more than sixty thousand inhabitants, according to the last or any subsequent federal census, and within the police jurisdiction thereof, to engage in the playing of tennis, golf, baseball and in operating moving picture shows on Sunday whether admission is charged or not. In any such city, the acts or any of them herein referred to may be prohibited by an ordinance passed by the governing body of such city. The governing body of such city must as a part of such ordinance provide that there shall be submitted to the qualified electors of such city at the next election held for any purpose, primary, special, or general, on a special ballot, separate questions as to whether or not the act or acts so prohibited shall be permitted or prohibited. If a majority of the qualified electors participating in such election shall vote in favor of permitting any one or all of the acts prohibited by such ordinance, such ordinance as to such act or acts shall thereafter be of no force or effect and such acts shall be lawful in such city and within the police jurisdiction thereof. After any election held under the preceding provisions of this section, the governing body of any such city may by ordinance provide at the next election held in such city for any purpose, or for a special election for the submission on a special ballot to the qualified electors of such city the question or questions as to whether any act or acts which a majority of the qualified electors of such city, participating therein at any election had voted in favor of prohibiting, may by ordinance be declared to be lawful. If a majority of the qualified electors participating in such election shall vote in favor of permitting any of the acts, herein referred to, on Sunday, the governing body of such city must so provide by ordinance. The cost of ballots, and of all special elections held hereunder must be paid by the city. Provided further, that it shall be lawful in cities of sixty thousand population, or more, according to the last, or any sub-

sequent federal census, to play or engage in playing baseball, football, tennis, golf, and to operate moving picture shows and vaudeville on Sunday, whether admission is charged or not. In any such city the acts herein permitted may be prohibited by an ordinance passed by the governing body of such city on the written petition therefor of not less than one-fourth of the qualified electors of such city, if, at an election, held on the day on which the next general election for Governor is held, a majority of the qualified electors shall vote in favor of the ratification of such ordinance. Such ordinance shall not be effective unless and until it is ratified by such vote at such election."

The provisos set out in Section 421, *supra*, were originally general acts of local application and are set out in the General Acts of Alabama, Extra Session 1932, pp. 98, 169 and General Acts of Alabama, 1935, pp. 755, 1095. While these acts did not amend Section 5540, of the Code of Alabama of 1923, they were added as provisos to said section 5540, *supra*, by the Code Committee of the 1939 Legislature, and brought forward into the Alabama Code of 1940 under Title 14, Section 421.

This office in an opinion to the Sheriff of Dallas County, Alabama, under date of September 30, 1930 (Biennial Report of Attorney General, 1928-1930, p. 961) held that it was not a violation of the statutory law of Alabama (Section 5540, Code of Alabama, 1923) for a person to operate a moving picture show on Sunday. The provisos added to Section 5540, *supra*, and brought forward into the Alabama Code of 1940 under Section 421, *supra*, apply only to cities whose population is not less than fifteen thousand inhabitants. There has been no change in the law in regard to cities whose population is less than fifteen thousand inhabitants since the opinion referred to above was written, therefore this opinion is still in force and effect.

Your second inquiry must be answered in the affirmative.

The Supreme Court of Alabama in the case of **Grimes vs. State**, 235 Ala. 192, 178 So. 73, held that "Bank Night" schemes, as operated by the picture shows, were lotteries. See also Biennial Report of the Attorney General, 1936-38, p. 522.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 9, 1942.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Municipal Corporations — Ad Valorem Taxation — Time within which municipal governing body must ordain ordinances or pass resolutions in order to make it the duty of county tax assessor and county tax collector to assess and collect city taxes under the provisions of Article 2, Title 37 of the Code of 1940—

In the event that city ordinance fixing city tax year, as is provided for by Section 698 of Title 37, and ordinance or resolution levying ad valorem tax on property within the municipality for the next succeeding tax year, as is provided for by Section 700, are ordained and passed by the municipal governing body on May 22, 1942, and certified and delivered to the county tax assessor on May 25, 1942, the action of the municipality is timely to make it the duty of the county tax assessor and county tax collector to assess and collect municipal ad valorem taxes for the next succeeding city tax year, notwithstanding the fact that the municipality was incorporated subsequent to October 1, 1941.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

Your request for official opinion bearing date of May 29, 1942, is as follows:

"The City of Mountain Brook formed a municipal corporation in Jefferson County during the early part of this year. About three weeks ago, they had a city election of a Mayor and Aldermen. They immediately levied a tax, of 50c per hundred dollars valuation, for city purposes. This levy was made on May 22, and delivered to the Tax Assessor of Jefferson County on the following Monday May 25th with a request that the Tax Assessor of Jefferson County assess the property so that 1943 taxes would be collected at the same time that 1942 taxes were collected for the State and County.

"The City of Mountain Brook has a population of thirty-five hundred. The question we would like to ask is whether or not, in view of the fact that the City of Mountain Brook was not a municipal corporation on the first day of Oct. 1941 when assessments for State and County taxes accrued and that they were not an organized municipal corporation on the 14th of May when the time for filing protests on assessments had passed, can the Tax Assessor assess and the Tax Collector collect taxes for the City of Mountain Brook beginning Oct. 1, 1942 for the tax year 1943?

"State and County taxes according to rulings of the Supreme Court of Alabama accrue on Oct. 1, 1941. Valuations were fixed and made final by the Board of Equalization on May 14, 1942. This would entail collection of City of Mountain Brook taxes on Oct. 1, 1942 on valuations that were determined before the City of Mountain Brook became a municipality. It is my understanding that May 22, 1942 was the first meeting of the Town Council.

"Due to the very limited time we have to make the changes required and the large volume of work which will have to be done at night, I would appreciate it very much if you would render me a ruling at the earliest possible moment."

As I understand the facts stated in your inquiry, the city of Mountain Brook duly and legally adopted an ordinance as is provided for by Title 37, Section 698 of the Code of 1940, fixing the tax year for the municipality to commence on October 1, of each year and end on September 30 of the next succeeding year; and providing that on and after October 1, 1942, municipal taxes should be based and due on state and county assessments for the preceding state and county tax year, and should be due and delinquent at the time when state and county taxes for the preceding state and county tax year are due and delinquent, and should be assessed by the county tax assessor and collected by the county tax collector.

And that under the provisions of Section 700 of said title, the mayor and board of aldermen, by resolution or ordinance, levied a tax on property situated in the municipality **for the next succeeding tax year** (that is to say, for the city tax year beginning October 1, 1942, and ending September 30, 1943), at the rate of fifty cents per one hundred dollars valuation; and that some clerical officer of the municipality, on or before June 1, 1942, certified and delivered to you, as Tax Assessor of Jefferson County, copies of the resolutions or ordinances passed by said board.

In my opinion, the adoption of the ordinance by the mayor and board of aldermen, providing for the method of collecting taxes set out in Article 2 of Title 37, and the adoption of the ordinance levying the tax, and due certification thereof to the county tax assessor on or before June 1, 1942, was a full compliance with the requirements of said Article 2 of Title 37 of the Code; and that the county tax assessor is thereby required to assess and the county tax collector to collect the taxes levied for the city of Mountain Brook for the city tax year beginning October 1, 1942, and ending September 30, 1943, notwithstanding the fact that the assessments for state and county tax purposes, upon which the city tax rate is based, were made prior to the time that the city of Mountain Brook became a municipal corporation.

There is no question here relating to levying a municipal tax covering a part of a city tax year during which the municipality undertaking the levy was not a municipal corporation. Here the tax levy made by the ordinance of May 22, 1942, is for the city tax year beginning October 1, 1942, and ending September 30, 1943.

The ordinances were, according to the facts stated in your request for opinion, ordained by the mayor and board of aldermen and certified by some clerical officer of the municipality in all respects as required by, and within the time provided by Sections 698 and 700, *supra*. Cf. *Quarterly Report of the Attorney General*, Vol. XVII, page 267. So that, the municipality has done all of the things which the statute requires that it should do in order to make it the duty of the county tax assessor and county tax collector to assess and collect city taxes levied for the city tax year beginning October 1, 1942, and ending September 30, 1943.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 9, 1942.

Hon. George H. Marsh, Director,
Division of Agricultural Chemistry,
Department of Agriculture and Industries,
Montgomery, Alabama.

Constitutional Law—Rules and Regulations.

1. The Department of Agriculture and Industries authorized and empowered to adopt a rule or regulation setting up a system of the registration of foods and drugs by dealers operating within the State and making it a voluntary proposition for the said dealers to comply with said rule or regulation.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion, bearing date of May 29, 1942, is as follows:

"We are attaching hereto a typewritten copy of a regulation to be submitted to the State Board of Agriculture for consideration. Prior to submitting this regulation, we would like to have any suggestions you may have to make as to the legality of this regulation.

"We discussed this matter with you Wednesday, May 27, and we have made the changes suggested at that time by you, and made this regulation purely a voluntary matter.

"We believe that this regulation would be of considerable assistance to us at this time of emergency in the enforcement of Alabama's Food and Drug Law. We sorely need all the assistance and aid possible at this time in protection of the food and drug supply of the State in order to protect the consuming public."

I have carefully studied the proposed rule or regulation which you attached to your request, and it is my judgment that the Commissioner of Agriculture and Industries, subject to the approval of the State Board of Agriculture and Industries, is authorized and empowered under the law to adopt the same. The power of the Commissioner of Agriculture and Industries, subject to the approval of the State Board of Agriculture and Industries, to promulgate reasonable rules and regulations necessary to accomplish the purpose for which the said Department was created, is found in Code of 1940, Title 2, Section 4. This section is as follows:

"§4. Promulgation of rules and regulations; enforcement; notice.—The commissioner of the department of agriculture and industries is charged with the execution and enforcement of the laws and provisions contained in this chapter and he is authorized and empowered, with the approval of the state board of agriculture and industries, to promulgate such rules and regulations as are reasonable and necessary to accomplish the evident purpose and intent of the law. The commissioner shall give notice of all rules and regulations promulgated as herein provided to all parties in interest, and to all parties who are likely to be interested in the same, within thirty days after the promulgation thereof, and such rules and regulations shall not become effective until the expiration of said thirty day period."

I deem it advisable to point out that under the express provisions of said rule or regulation under consideration, that it is not compulsory for the affected parties to comply with the same but is purely a voluntary matter.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 10, 1942.

Hon. F. L. Gaddis,
Judge of Probate,
Autauga County,
Prattville, Alabama.

Counties—Discharged Employees—Authority to continue payment of employee's salary after date of his lawful discharge—

An employee of the county, engaged in superintending road construction, cannot be paid his salary beyond the date of his lawful discharge by the county governing body.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

Your request for official opinion bearing date of May 28, 1942, is as follows:

"On September 1941, the Board of Revenue of Autauga County employed Mr. Forrester Smith to superintend the construction of Highway 45 in Autauga County. Mr. Smith was employed on a monthly basis and his monthly salary was \$100.00. During last week some of the men refused to work on this job. There had been some disagreement with Mr. Smith and the commissioner of that district as to who should supervise the work.

"Last Saturday the Board of Revenue met and decided to replace Mr. Smith. The work of Mr. Smith was satisfactory with the engineers of the State Highway Department who had direct supervision over him.

"The majority of the members of the Board of Revenue feel that Mr. Smith was not treated exactly fair upon not having any previous notice of his replacement.

"We desire to know if under the above circumstances the Board of Revenue has the authority to pay Mr. Smith one months salary after the resolution replacing him, which resolution was effective immediately."

In my opinion, your inquiry must be answered in the negative. Cf. Quarterly Report of the Attorney General, Vol. XXIII, page 220.

Although the county governing body has general and unlimited authority and jurisdiction with reference to matters relating to public roads and bridges, that authority and jurisdiction cannot be construed to include the authority and power to donate public funds to private individuals.

Section 94 of the Constitution stands as an insuperable barrier to the Legislature delegating any such authority to the county governing body. As here pertinent, it provides:

"§94. The legislature shall not have power to authorize any county *** to grant public money *** to any individual ***."

Cf. **Griffin v. Jeffers**, 221 Ala. 649, 130 So. 190; **Stone v. State ex rel. etc.**, 223 Ala. 426, 136 So. 727; **Board of Revenue and Road Commissioners of Mobile County v. Puckett**, 227 Ala. 374, 149 So. 850.

Under these authorities, the only way that any possible public moral obligation to the lawfully discharged employee may be satisfied is by a special relief act of the Legislature, (if the Legislature determines that the money to be expended therefor would be in the acquittance of a moral obligation due by the public to the lawfully discharged employee).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 10, 1942.

Hon. J. W. Stacks,
Circuit Clerk,
Tallapoosa County,
Dadeville, Alabama.

Fees—Costs of Court Chargeable to Fine and Forfeiture Fund if there is a Judgment for Costs and Execution Returned "No Property Found."

Opinion by Assistant Attorney General Flowers.

Dear Sir:

Your request for official opinion bearing date of May 29, 1942, is as follows:

"When a defendant is given a jail sentence is the clerk entitled to write the case up against the Fine and Forfeiture Fund."

In answer to the above request, we quote you the following Code Section, to wit: Section 393, Title 15, Code of Alabama, 1940, provides as follows:

"§393. Surplus of fund to pay officers.—Whenever there shall be a surplus of the fund arising from fines and forfeitures in the county treasury of any county, over and above the sum required to pay the registered claims of the state witnesses, the county treasurer of such county must pay the fees of the officers of the court arising from criminal cases in which the defendant is not convicted and the costs are not imposed on the prosecutor, or in which defendants have been convicted, and have been proved insolvent by the return of executions 'no property found,'
*** "

I am of the opinion that when a defendant has been convicted and sentenced to serve a jail term and judgment has been properly entered against him for the costs, if an execution has been issued and returned "no property found," such costs may be paid from the fine and forfeiture fund of the county. A judgment for costs and an execution returned "no property found" are conditions precedent to the payment of costs from the fine and forfeiture fund. Title 15, Section 393, supra. Quarterly Report, Attorney General, Vol. XV, page 117.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 11, 1942.

Hon. Walter B. Jones, Director,
State Department of Conservation,
Capitol.

Fines and Penalties arising under Chapter 4, Article 1, Code 1940 go to the credit of the Forestry Fund unless there be an informant or party making affidavit. In this instance, one-half of the fine or penalty goes to such informant or person making affidavit, but in no instance can such informant or party making affidavit receive more than \$25.00 in any one case.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of May 29, 1942, in which you request an official opinion, is as follows:

"Re: Request for official opinion regarding fines arising under the forest fire laws of Alabama.

"Section 218, Title 8 of the 1940 Code of Alabama provides that one-half of all fines and penalties arising out of the violation of the forest fire laws shall be paid to the informant or party making the affidavit as to the commission of the offense. No provision is made for disposition of the other half of the fine.

"It is our desire to have your opinion as to the disposition of the other half of the fine or of the entire fine when there is no informant. In other words, to what depository or fund should the fine be sent by the magistrate who tries the case and collects the fine."

In answering the above, I refer you to Title 8, Chapter 4, Article 1, Code of 1940, and especially to Section 202 thereof, which is as follows:

"§202. How conservation fund paid out.—There shall be a fund within the conservation fund, which shall be known as the state forestry fund. This fund shall consist of all occupational licenses or privilege taxes imposed by the state for engaging in any business dealing with timber or timber products and all fines and forfeitures arising under the provisions of this article shall be paid into the forestry fund. All necessary expenses of the division of forestry of the department of conservation shall be paid out of said fund on the requisition of the director of conservation, with the approval of the governor. At the end of each fiscal year, the governor may require all, or any part of, the surplus of the fund then existing, to be covered in the general fund."

It is plain from the above-quoted section that all fines and penalties arising under this article of the Code must go to the credit of the Forestry Fund, unless there be an informant or party making the affidavit, in which

instance, half of the fine or penalty goes to such informant or party making such affidavit. In no instance can such informant or party making affidavit receive an amount in excess of \$25.00 in any one case. I call your attention in this connection to Title 8, Chapter 4, Article 1, Section 218, Code of Alabama, 1940, which is as follows:

"§218. Disposition of all fines and penalties arising out of the violation of the provisions of chapter.—One-half of all fines and penalties arising out of the violation of the provisions of this chapter shall be paid to the informant or party making the affidavit as to the commission of any offense embraced in said chapter; provided however, in no case shall the amount paid to the informant or party making the affidavit as to the commission of any offense embraced in said chapter exceed the sum of twenty-five dollars."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 11, 1942.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Court of County Commissioners — Commissioners' Districts —
Change of Commissioners' Districts.

Under the provisions of Title 23, Section 43, Code of 1940 the Court of County Commissioners, in absence of local statute fixing limits of Commissioners' Districts, may change the Commissioners' Districts in such manner as it appears to them will be to the best interest of the county in carrying on the road and bridge work of the county.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of June 3, 1942, is as follows:

"The location of Camp Rucker in this county, and the closing and abandonment of the county roads in the camp area has taken about fifty miles of roads off county maintenance. This sharply reduces the road mileage of one of the commissioners districts, making necessary a re-arrangement of the four commissioners districts of the county.

"I am not able to find any law governing the creation or change of commissioners districts, and desire your opinion as to whether the Court of County Commissioners has not the right to make such changes in these districts as to them may appear to be for the best interests of the county in carrying on the road and bridge work.

"If the Court has not this right, please suggest the proper course."

I have been unable to find any local act creating the Court of County Commissioners of your county, or any act dividing this county into Commissioners' Districts. I assume that the Commissioners' Districts of your county, as they now exist, were set up by proper resolution of the Court of County Commissioners. Based upon the assumption that your Court of County Commissioners is operating under the general law of the State, it is my opinion that, under the authority of Section 43, Title 23, Code of 1940, your Commissioners' Court may, upon proper resolution, re-divide or re-arrange the four Commissioners' Districts of your county. Section 43, *supra*, reads as follows:

"§43. Powers of courts of county commissioners with regards to roads, bridges and ferries.—The courts of county commissioners, boards of revenue, or other like governing bodies of the several counties of this state have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judicial, and executive powers, except as limited in this chapter. Courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges, and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public roads, bridge, or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 18, 1942.

Hon. Walter B. Jones,
Director,
Department of Conservation,
Montgomery, Alabama.

Department of Conservation—Division of Forestry—Property—
Use of income from—

The Department of Conservation, Division of Forestry, may use the income derived from salvage from structures on the tract of land connecting Ft. McClellan with the National Forest for the maintenance of said tract.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of June 11, 1942, is as follows:

"On May 5, 1941 you released an official opinion to Hon. A. R. Forsyth, Director of Finance, to the effect that the legislative appropriation (General Acts 1939, page 411) for the acquisition of land in Calhoun County connecting Ft. McClellan with the National Forest should be released to the Department of Conservation, Division of Forestry, and further that such lands should be administered by said department.

"The lands acquired have been purchased by the Department of Conservation for the purposes indicated in the appropriation bill. There can be salvaged from structures and other property on said land an amount of approximately \$3,500. Inasmuch as the Department of Conservation is charged with the administration of this land, I would like to have your official opinion as to whether or not the department may use the revenue derived from salvage for the purpose of maintenance thereof."

My answer to your inquiry is in the affirmative.

The opinion to which you refer in the above request is found in Quarterly Report of the Attorney General, Volume XXIII, page 121. It is to be noted that the authority for the appropriation considered in said opinion, to be released to the Department of Conservation, Division of Forestry, is found in Section 989, Code of 1923. This section appears in the Code of 1940 as Section 3, Title 8. After providing that the Department of Conservation, for the purpose of establishing, developing, and maintaining State Forests, and State Parkways, and State Parks, may acquire land by purchase, donation, lease, or condemnation, this section reads as follows:

"§ 3. *** When lands are acquired or leased under this section, the department of conservation is authorized to make expenditures from any funds not otherwise obligated for the management, development and utilization of such areas, to sell or otherwise dispose of products from such lands, to have sole charge of all state forests and state parks and parkways and to have authority to make such rules and regulations for the management, administration, occupancy and use of said state forests and state parks and parkways, and all property and things of whatsoever nature therein or thereon, as it shall find necessary. *** "

It is to be noted that when lands are acquired under the provision of this section, the Department of Conservation is authorized to make expenditures from any funds not otherwise obligated for the management, development, and utilization of such lands. The approximate sum of \$3,500, which is contemplated will be salvaged from this tract of land, is such a fund that is not otherwise obligated, and in my opinion, under the authority of the above quoted section of the Code, this sum may be used to maintain the tract of land purchased by the Department of Conservation, Division of Forestry, connecting Ft. McClellan with the National Forest.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 19, 1942.

Hon. Fred Posey, Clerk,
Circuit Court, Autauga County,
Prattville, Alabama.

Fees and trial tax in Inferior Court of Autauga County—

There is no authority of law for charging a court fee of \$6.00 in the Inferior Court of Autauga County. There is no authority of law for assessing the trial tax (provided for in Title 51, Section 20, Code 1940) in a civil or criminal case in the Inferior Court of Autauga County.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of June 12, 1942, in which you request an official opinion, is as follows:

"When I entered upon the duties of this office on March 1st, 1941, I found there was being taxed against each defendant a County Court Fee of \$6.00, for all of the Criminal Cases in the Civil and Criminal Court of Autauga County.

"Neither of the local laws which created the Courts mentions the \$6.00 Court fee. The Local Laws which create the Civil and Criminal Court are found in Local Laws 1923, page 233, H. 992 Dickinson and approved September 26th, 1923, also Local Acts 1935, page 82, H. 548 Doster.

"In reading an old report of the examiners of this office, I found this.

"Examination of Hon. Fred H. Price, Circuit Clerk and Register, for period from February 1st, 1938 to April 1st, 1939. Examination was made by assistant examiners of Accounts E. C. Frazier, Jr. and W. H. Jones, dated May 18, 1939.

"By a local act, approved September 27, 1923, which was amended June 27th, 1935, the Inferior or Civil & Criminal Court of Autauga County, as it is designated, was established in lieu of the County Court of Autauga County. The fees to be charged by the officers of this Court are the same as those charged by the officers of the Circuit Court but the local law expressly provides that the Court Costs which accrue therein other than officers costs shall be the same as allowed the justices of the peace in the several precincts of the County. In this connection it was found that the Clerk of the Court has been charging a County Court fee of \$6.00 which your examiners failed to find law to support. This matter has been brought to the attention of the Clerk."

"Please advise me whether or not to continue charging the Court fee of \$6.00. Please advise me when to charge the regular \$3.00 trial tax. Please advise me when not to charge the regular \$3.00 trial tax. In the event I am supposed to continue charging the Court fee of \$6.00, am I also to collect a trial tax of \$3.00."

Local Acts, 1923, page 244, No. 379, H. 892, approved September 26, 1923, established what is called the Inferior Court of Autauga County in Precinct 1 of said county and confers on said court the jurisdiction of a justice of the peace in civil and criminal matters. I find by Local Act No. 158, H. 548, Local Acts of 1935, page 82, approved June 27, 1935, that this act purports to amend the 1923 act, supra, but is in fact a reenactment of the 1923 act with some changes. But nowhere do I find any authority for the \$6.00 court fee referred to by you. Just where the clerk gets this court fee I am unable to determine. Therefore, it is my opinion no such charge is warranted, being without authority of law. I call attention to the provisions of Title 11, Section 79, Code of 1940, and the cases cited thereunder. This section is in part as follows:

"§ 79. No fee charged unless expressly authorized.—The law of costs must be deemed and held a penal law, and no fee must be taken but in cases expressly provided by law. *** "

As to the trial tax in the Inferior Court of Autauga County, I call your attention to an opinion rendered May 29, 1941, addressed to you, as Clerk of the Civil and Criminal Court of Autauga County (Quarterly Report of Attorney General, Volume XXIII, page 172). This opinion holds:

"There can be no trial tax charged in any civil case which is tried in the Inferior Court of Autauga County, Alabama."

I am aware of the fact that it says "any civil case", but it applies with equal force to criminal prosecutions.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 19, 1942.

Hon. Haygood Paterson,
Commissioner of Agriculture and Industries,
515 Dexter Avenue,
Montgomery, Alabama.

Warehousemen—Storage Charges—Code 1940, Tit. 2, §§ 504-586—

1. Upon surrender of warehouse receipt, payment of storage charges on the stored property accrued to that time, and instructions to the warehouseman for delivery of the stored property to a carrier for shipment, storage charges thereon cease to accrue, unless the warehouseman, without fault on his part is unable to deliver the property to the carrier for shipment.

2. If, however, without fault on his part, the warehouseman is unable to deliver the property to the carrier for shipment and it is necessary for him to continue to store the same he is entitled to his charges for such additional storage.

3. What is a reasonable time for the warehouseman to ship the stored property is a question of fact in each particular case to be determined from all the facts and circumstances in the case.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of June 8, 1942, is as follows:

"We would appreciate your giving us an opinion on the following question:

"When a Cotton Company has ordered cotton shipped from a warehouse, paid all accrued storage on same up to the date the order is given, and turned over the receipts for the cotton to the warehouseman, who is responsible for the storage on this cotton if shipment is delayed by the warehouseman for any length of time?

"Would the warehouseman have any right to charge the Cotton Company for storage from the date the cotton was ordered shipped to the date it was actually shipped? What would be considered a reasonable length of time to lapse between date the shipping order is given and the date the cotton is shipped?"

In connection with this request for my opinion I have examined a printed form of warehouse receipt which you have referred to as "standard form" of the receipt for storage of cotton. After reciting the receipt of one bale of cotton, described and identified by marks and weight, the receipt further

provides that "upon the surrender of this receipt and the payment of all charges and liability which may be due the undersigned warehouseman, as stated herein, the said one bale of cotton will be delivered to the bearer." Said receipt also stipulates for charges, the amount of which is to be inserted therein, for "Weighing and other charges for first month or fraction thereof _____, Storage per month or fraction thereafter _____, Turning out _____, Insurance per month _____" and for other miscellaneous charges.

The relationship between warehouseman and the owner or depositor of property stored is purely contractual and governed by the law of bailments, subject to regulation by statute, inasmuch as the business of warehousing is affected with a public interest. 67 C. J. 452, § 17, 453 § 20; 67 C. J. 446 § 7.

The terms of the contract are to be ascertained from the warehouse receipt, taken in connection with the statutory law regulating the warehouse, and possibly also what is customary in the absence of express stipulation.

It is said that:

"Where a warehouseman undertakes to furnish storage and there is no express contract as to the length of time for which the goods shall remain in storage, the contract is a continuing one until it is terminated by one of the parties, either by the removal of the goods by the person storing them, or by notice to do so by the warehouseman." 67 C. J. 453, Section 19.

It will be observed from the form of standard warehouse receipt, above referred to, that storage charges are to be made on a monthly basis and that the fractional part of a month shall evidently be counted as a full month for the purpose of computing such storage charges.

From your letter it appears that in this instance the bailor or depositor of the cotton stored, therein referred to as a cotton company, has terminated the contract by surrender of warehouse receipts and payment of all accrued storage up to the date of order for delivery for shipment by the warehouseman.

I infer that the words "turning out" under the word "CHARGES" on the receipt refer to the expense of delivery of the cotton to a railroad company or other carrier for shipment pursuant to order of the cotton company. In that respect, of course, the railroad company or carrier would be the agent of the cotton company, and, if the warehouseman promptly makes delivery, or offers to deliver, to the carrier for shipment, then, in my opinion, his contract obligation has been performed. If, without default on his part, he is unable to make delivery to the carrier for prompt shipment, and, for that reason, is forced to keep the cotton in storage for an additional length of time after receipt of instructions for shipment, I am of opinion he would be entitled to charge for such additional storage.

If on the other hand, through some fault or negligence of his own the warehouseman fails to make prompt delivery to the carrier for shipment, as instructed, then, in my opinion, he would not be entitled to make additional

charges for storage after receipt of the order to deliver, on the principle that a party to the contract may not take advantage of his own wrong or negligence.

What is a reasonable time within which the warehouseman must deliver to the carrier for shipment is a question of fact, as to which I am unable to give any satisfactory answer. Answer to such a question must necessarily depend upon all the facts and circumstances surrounding each particular transaction. As a general proposition, I should think that all that is required of the warehouseman in this respect is to exercise such diligence as a prudent man would exercise in his own behalf with respect to his own property.

The Alabama Warehouse Law (Code 1940, Title 2, Sections 504-586) is silent as to what shall constitute a reasonable time for delivery by warehouseman of goods stored after demand therefor by the depositor, and is likewise silent as to when the period for charging storage is terminated. I have had to recur, therefore, to general principles of common law in order to arrive at any conclusion as to this matter, as provided by Code 1940, Title 2, Section 565.

I understand also that the Department of Agriculture and Industries has not formulated any rule or regulation bearing on this question, as it would probably be authorized to do in case it saw fit.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 19, 1942

Hon. J. F. Davis, President,
Court of County Commissioners,
Covington County,
Andalusia, Alabama.

County Surveyors—

County surveyors appointed under Section 1, Title 56, Code 1940, required to register with the State Board of Registration for Professional Engineers and Land Surveyors in accordance with Chapter 7, Title 46, Code of Alabama 1940.

Opinion by Assistant Attorney General Flowers.

Dear Sir:

Your request for official opinion bearing date of June 8, 1942, is as follows:

"Title 56, Chapter 1 through 11, of the Code of Alabama, 1940, provides for the appointment by the Court of County Commissioners, or other like Governing Body, of County Surveyors, upon being satisfied by evidence that the person appointed is qualified to discharge the duties of a surveyor.

"Chapter 7 of Title 46, of the Code of Alabama, 1940, provides for the registration of Engineers and Land Surveyors with the State Board of Registration for Professional Engineers and Land Surveyors. I would like to get your opinion on the following question:

"Would it be permissible for the Court of County Commissioners of Covington County to appoint two County Surveyors who are not registered with the State Board of Registration for Professional Engineers and Land Surveyors, if the Court is satisfied that the men to be appointed are qualified?"

Section 1, Title 56, Code of Alabama 1940 provides:

"§ 1. **Number; appointment; term of office.**—The court of county commissioners, or other like governing body is authorized to appoint two surveyors for the county, who hold office for the term of three years, and until their successors may be qualified, unless sooner removed. Before making an appointment, the court must be satisfied by evidence that the person appointed is qualified to discharge the duties of a surveyor. It is no objection that a person appointed county surveyor is a qualified surveyor of an adjacent county; but he must qualify in each county." (Emphasis supplied.)

Section 129, Title 46, Code of Alabama 1940 requires that "any person practicing or offering to practice the professions of engineering or land surveying shall hereafter be required to submit evidence that he is qualified to so practice and shall be registered as hereinafter provided."

Section 130, Title 46 provides: "The term 'land surveyor', as used in this chapter, shall mean a person who engages in the practice of land surveying as hereinafter defined."

Section 140, Title 46 has to do with the general requirements for the registration of land surveyors.

Section 150, Title 46 provides that "any person who shall practice or offer to practice the profession of engineering or land surveying in this State without being registered or exempted in accordance with the provisions of this chapter shall be guilty of a misdemeanor," etc.

The language of the statute here is significant. It will be noted that in referring to those who must be registered, the statute provides, "Any person who shall practice or offer to practice the profession of land surveying." It does not say anyone who, "engages in the business of." It would not be difficult to conceive a distinction between these two clauses. A person who practices a profession would include one who is employed to perform duties which are ordinarily performed by persons of that profession.

Section 147, Title 46, Code of Alabama 1940, exempts certain persons from the requirements of registration, and among those so exempted are "officers and employees of the Government of the United States while engaged within this State in the practice of the profession of engineering or land surveying for said government." It apparently follows as a logical conclusion, that it was the legislative intent that had such employees of the Government of the United States not been specifically exempted from the provisions of this chapter, they would have been included therein. The surveyors employed by a county are not specifically exempted from the provisions and requirements of the statute. If it was the intention of the Legislature that the requirement of registration would apply to employees of the Government of the United States unless they were specifically exempted, then, consequently, it is reasonable and logical to conclude that the Legislature intended for the requirements to apply to the employees of the other units of our body politic, such as the State and several counties.

Another obvious clause in the statute which has a bearing upon your inquiry is found in the last sentence of Section 1, Title 56, supra, "It is no objection that a person appointed county surveyor is a qualified surveyor of an adjacent county; but he must qualify in each county." Thus, the statute emphasizes the intention that a county surveyor should qualify as such under existing law.

Pursuant to the statutes quoted, and the foregoing line of reasoning, it is my opinion that a court of county commissioners may not appoint a person under Section 1, Title 56, supra, as county surveyor unless said appointee has complied with the requirements of Section 129, et sequitur, of Title 46, Code of Alabama 1940.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 19, 1942.

Mrs. Edwina Mitchell, Associate Member,
State Board of Pardons and Paroles,
Capitol.

Board of Pardons and Paroles—Power to remit final judgment
of forfeitures of bail—

Under the authority of Section 16, Title 42 of the Code of 1940, the Board of Pardons and Paroles has the power to remit final judgment of forfeiture of bail bond, notwithstanding the fact that the defendant released from custody on faith of such bail bond has not been convicted.

Opinion by Assistant Attorney General Rowe.

Dear Mrs. Mitchell:

Your request for official opinion bearing date of May 20, 1942, is as follows:

"In a recent conference with the Alabama State Examiner of Accounts, he stated that this Board has improperly and illegally remitted forfeitures, and that it has been necessary for him to charge back to the clerks of the courts who have issued executions and collected the full amount of the judgments. He referred us to Title 42, Section 16, of the Law, which provides:

" 'In all cases except treason and impeachment, and except in cases in which sentence of death is imposed and not commuted, as is provided by law, the board shall have the authority and power, after conviction and not otherwise, to grant pardons and to remit fines and forfeitures.'

"The examiner of accounts interprets that to mean that this Board cannot remit judgments on forfeitures unless there has been a conviction of the defendant for whose appearance the bond was made. We shall appreciate an opinion from you setting us straight in this matter."

In my opinion, when forfeiture against the defendant and bail for breach of the conditions of his bail bond is had and judgment nisi rendered thereon and the said judgment made final, the Board of Pardons and Paroles may remit the forfeiture regardless of whether or not the defendant has been convicted of the offense for which he tendered the bail bond.

Section 212, Title 15 of the Code of 1940, provides:

"§ 212. Undertaking of bail; essence of, and when forfeited.—The essence of all undertakings of bail, whether upon a warrant, writ of arrest, suspension of judgment, writ of error, or in any other case, is the appearance of the defendant at court; and the undertaking is forfeited by the failure of the defendant to appear, although the offense, judgment, or other matter is incorrectly described in such undertaking, the particular case or matter to which the undertaking is applicable being made to appear to the court."

See *Holcombe v. State*, 99 Ala. 185, 12 So. 794.

Section 213 provides that when the undertaking of bail is forfeited by the failure of the defendant to appear as required, a constitutional judgment must be rendered by the court in favor of the state, for the use of the proper county, against the parties to the undertaking for the sum thereon expressed.

Sections 214 et seq. provide for a notice of the rendition of such judgment nisi, which must be served upon the parties to the bail bond and returned by the sheriff; or if the sheriff is unable to serve the same, the return

of two such notices "not found" is made the equivalent of personal service.

Section 217 provides:

"§ 217. Conditional judgment set aside, reduced or made absolute.— If the defendants appear and show sufficient cause for the default, to be determined by the court, the conditional judgment must be set aside; but if the excuse is not sufficient, or if they fail to appear, the judgment must be made absolute for the entire sum expressed in the undertaking, or any portion thereof, according to the circumstances.

The proceedings for the rendition of judgment on a forfeited bail bond are "civil proceedings" as contra-distinguished with "criminal proceedings." *Busby et al. v. State*, 18 Ala. App. 549, 93 So. 372; *State ex rel. French et al. v. Stone, County Treasurer*, 224 Ala. 234, 139 So. 328.

So that, the proceedings for the rendition of judgment because of the breach of conditions of a bail bond are in no wise dependent upon the trial and conviction of the defendant who was released from custody on the faith of the said bail bond.

Section 16 of Title 42 of the Code of 1940, which is copied into your request for opinion, deals with pardons and with the remission of fines and forfeitures.

At common law pardons proceeded from the crown by virtue of its prerogative. 46 C. J. 1184, par. 8. And, unless now restricted by constitution or law, the power to pardon may be exercised at any time after the commission of an offense, either before legal proceedings are taken, or during their pendency, or after conviction and judgment; and an offender may also be pardoned after he has suffered the punishment adjudged for his crime. In a number of states the governor is empowered by the constitution to grant pardons after conviction. Such a provision patently is intended to prevent the abuse of the pardoning power and precludes an exercise of the power unless there has been a conviction. *Ibid.* p. 1189, par. 24.

So that, the limitation "after conviction" in Section 16 of Title 42 of the Code of 1940, is intended to limit the authority and the power of the Board to grant pardons until after conviction. After conviction, in the case the punishment is fixed as a fine, the fine may be remitted by the Board; and in the case of a sentence to the penitentiary or to hard labor, the convict may be paroled or pardoned. But the Board has power to remit forfeitures at any time after the judgment of forfeiture is made final. *State ex rel. French x. Stone*, *supra*.

In the last cited case, the Supreme Court said:

"No one, we assume, would pretend to hold that the next hour after the judgment was made final against the sureties on the bond of *Mo-berg*, the governor could not have remitted the forfeiture then made final against the sureties. This has been done from the earliest history of the state without question of the authority of the governor. This power to remit such judgment, at all times called 'final forfeitures' has been confided to the governor or the executive branch of the government."

The court was there dealing with the governor's power to remit forfeitures under Section 124 of the Constitution, as it was then in force. The amendment of Section 124 of the Constitution (Act No. 8, S. 24, approved March 29, 1939, General Acts, 1939, Special Session, page 8) relieved the governor of the power to grant pardons and paroles or to remit fines and forfeitures, and provided that the legislature should have the authority to regulate the administration of pardons and paroles and the remission of fines and forfeitures. Section 16 of Title 42, *supra*, stems from that constitutional amendment.

But the rule stated in the excerpt from the **French Case**, *supra*, is now as applicable to the power of the Board of Pardons and Paroles as it was then applicable to the power of the governor prior to the amendment of Section 124 of the Constitution.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 20, 1942.

Hon. Floyd Forman, Chairman,
Macon County Board of Revenue,
Tuskegee, Alabama.

Sheriffs—Deputies—Payment by County—

In the absence of local legislation, there is no authority of law for the Court of County Commissioners to pay the salary of a deputy sheriff appointed by the sheriff, other than the chief deputy, provided for by Section 3, Title 54, Code of 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion, bearing date of June 15, 1942, is as follows:

"Our County is now called upon to provide at least one more Deputy Sheriff due to the locating of the large Government Negro Airfield near Tuskegee and the greatly increased number of negroes coming into our County following the negro soldiers. Our Sheriff and his one Deputy cannot adequately handle the vast increase in activity and work in his office. The Board of Revenue feels inclined to provide funds for another deputy, but cannot do so under the existing law, if we understand it correctly. Is there any way we can handle it so that it would meet with the approval of the State Examiners?"

In the absence of local legislation, there is no authority for the Court of County Commissioners to pay the salary of an additional deputy sheriff. **Court of County Commissioners v. Lightner**, 225 Ala. 22, 141 So. 908. I do not find where the legislature has passed any local act authorizing the Court of County Commissioners of Macon County to pay the compensation of an additional deputy sheriff.

Section 3, Title 54, Code of 1940, reads in pertinent part as follows:

"§ 3. Deputies.—In all counties of the State of Alabama in which the sheriff is not on a salary basis under and by virtue of a constitutional amendment, the sheriff of such county must have one chief deputy, and may have as many other deputies as he may think proper, but the coroner of such county shall not be appointed a deputy. Said chief deputy shall be appointed by the sheriff of the county to hold office at the pleasure of the sheriff, and for his services shall receive a salary of such amount as may be fixed by the court of county commissioners, board of revenue or other governing body of the county in which such chief deputy is appointed not less than nine hundred and not more than fifteen hundred dollars, payable in twelve equal monthly installments out of the treasury of the county upon the warrant of the board of revenue or court of county commissioners of such county. *** "

It appears from the above quoted section that the court of county commissioners is only authorized to pay the salary of one chief deputy appointed by the sheriff. There is no provision providing for the compensation of other deputy sheriffs appointed by the sheriff, and it thus appears that such deputies must look to the sheriff for their compensation. Biennial Report of Attorney General, 1926-28, page 74.

In view of the above, you are advised that your county may not pay for an additional deputy sheriff to take care of the contingency which now exists in Macon County.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 20, 1942.

Hon. G. R. Dollar,
Judge of Probate,
Winston County,
Double Springs, Ala.

Winston County—Expenditure of funds received from the U. S. Government for the sale of timber in Alabama National Forest.

Opinion by Assistant Attorney General Flowers.

Dear Sir:

Your request for official opinion bearing date of June 13, 1942, is as follows:

"Winston County has received the following amounts through the State Treasurer which was its share of the funds received from the federal government from the sale of timber in the Alabama National Forest: On March 28, 1940, \$1,148.53; on April 4th, 1941, \$1,254.57 and on Feb. 6, 1942 the sum of \$1,576.28.

"Article 3, Chapter 4, of Title 8, 1940 Code of Alabama, makes special provisions for the use of these funds in Winston, Lawrence and Franklin Counties. Of the first funds received by this County \$500.00 was paid to the Board of Education for use of schools and \$500.00 was paid the Winston County Highway Board for use on roads. Since the road from Double Springs to Moulton has been taken over by the State of Alabama and the federal government it is my opinion that all funds now held in trust, as per instructions received from the State Treasurer, and any funds hereafter received should be placed in the general fund of the County. See Section 231 of the above named Article. Instructions received from the State Treasurer on February 6, 1942 stated that the payment then being made of \$1,576.28 and any amount thereafter paid should be placed in a trust fund until the State Legislature determined what should be done with it. I think this was to apply to those counties which receive funds from this source other than the three named above.

"Please advise me whether or not the funds so received can be placed in the general fund of this County."

A close study of the provisions of Article 3, Chapter 4, Title 8, Code of Alabama, 1940, will leave little doubt that it was the intention of the legislative body that the funds distributed to Winston County under said article should be used for the purposes of education and road building. Section 227, Title 8, *supra*, provides:

"§227. **Distribution of federal funds to Lawrence, Winston and Franklin counties.**—Funds paid by the federal government to the state of Alabama which are to be used for road-building and educational purposes in Lawrence, Winston, and Franklin counties, in accordance with the acts of congress establishing a national forest in these counties, shall be distributed to each county according to the proportion of national forest in each county."

Section 231, Title 8, provides:

"§231. **Division of funds in Lawrence and Winston counties.**—Until the road from Double Springs through the Alabama national forest to Moulton is taken over by the State of Alabama or the federal government or both, the funds derived from each of the counties, Lawrence and

Winston, shall be used in the following manner: The first five hundred dollars received hereunder shall be used in the cause of education, and the second five hundred dollars thus received shall be used as above directed, and each of the following allotments of five hundred dollars thus received shall be disbursed by each of the said counties alternately in the cause of education and upon the roads named above or such other roads as may be designated by the board of revenue of each of said counties. In the event that the money heretofore paid has heretofore found its way into the treasury and cannot be at present parceled out and located, the director of finance of the State of Alabama is hereby required to draw a warrant on the treasury of the State of Alabama in favor of each of the said counties above named for the proportionate amounts due to each of the said counties as directed by this article, payable out of any money in the treasury, not otherwise now appropriated."

It is true that the verbiage of the latter statute is rather ambiguous and indefinite as to the disbursement and distribution of the funds after the contingency therein referred to had been consummated; that is to say, after the road from Double Springs to Moulton has been taken over by the State and federal governments. However, if the article is read as a whole, rather than segregating each section and construing its meaning individually, the intention becomes clear. A significant phrase in Section 231, supra, is as follows, "and each of the following allotments of five hundred dollars thus received shall be disbursed by each of the said counties alternately in the cause of education and upon the roads named above or such other roads as may be designated by the board of revenue of each of said counties."

In my opinion, it was the intention of the Legislature that the funds thus derived should be used by the respective counties for the purposes of education and road building on an equal basis. Certainly it was not intended that the road from Double Springs to Moulton is the only road on which the money could be spent.

It is my opinion that, since the road from Double Springs to Moulton has been taken over by the State and federal governments, the amount which previously went towards the building and maintenance of said road may now be used for any other road building which the board of revenue sees fit. To state the matter in other words, the accumulated amount as well as the future distributions from this source received by Winston County should be divided into allotments of five hundred dollars each and should be distributed alternately for the purpose of education and for the purpose of road building. The expenditure of this money is confined to these two purposes and none other. That part of the money not used for educational purposes must be expended for road purposes. It should not be covered into the general fund unless earmarked in that fund for road purposes.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 20, 1942.

Hon. James A. Simpson,
State Senator, Jefferson County,
Frank Nelson Building,
Birmingham, Alabama.

License Taxation—"Beauty Parlor Schools"—Liability for license
on account of instructor—operators and student-operators—

A "beauty parlor school" which charges tuition for students desiring to learn the trade, which said students, in the course of training, observe or are given demonstrations by instructors employed by the school, by service of such instructors to customers for which a nominal charge is made for services and for the material used; and which, after the students have progressed to the point that they are able to practice the trade, as a part of their course of training, upon customers who are charged a nominal sum for such services and for the material used; is required to pay basic license of \$10.00, and on account of the said instructors and students, is required to pay the license for each operator which is levied by Section 473 of Title 51 of the Code of 1940.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

Your letter of May 19, 1942, in which you request an official opinion, is as follows:

"Would you be good enough to advise whether or not Schedule 21 of Section 348 of the 1935 Revenue Act would apply in the following sort of case:

"A school of beauty culture operated by one person as principal accepts and charges tuition from persons desiring to learn the trade, who are in turn trained by the principal, and in the course of training, customers are served and a nominal charge made for services and material.

"First, are instructors who are paid by the principal and, who demonstrate on customers for the benefit of the students, employed in such sense that the \$10.00 license must be paid on such instructor?

"Secondly, when the students themselves progress to the point where they can practice on customers and do so, are they such operators as that a license must be paid on them?"

Your first question must be answered by advising that the operator or owner of the "beauty parlor school" is required to pay the basic license of \$10.00, and must pay operator's license on account of each instructor employed.

Schedule 21 of Section 348 of the Revenue Act of 1935, which was carried forward into the Code of 1940, without change, as Section 473 of Title 51, provides:

"§ 473. Beauty parlors, etc.—Each person operating what is generally known as a beauty parlor, or other place where hair dressing, facial treatments, manicuring, or hair waving is done shall pay a license of ten dollars and for each operator so employed, as follows: In cities of more than sixty thousand inhabitants, six dollars. In cities of less than sixty thousand inhabitants and all other places where incorporated or not, four dollars. This schedule of fees shall apply to beauty parlor colleges where said colleges engage in beauty parlor work for which a charge is made for material used is charged therefor."

This section was construed by the Supreme Court in the case of **State v. Birmingham Beauty Shop**, 240 Ala. 170, 198 So. 435; and again in **Nelson v. Brown**, 7 So. 2d. 572.

In the former case, the Court said:

"One definition of 'employment' is: 'That which engages or occupies;' 'one's occupation.' Webster's International Dictionary. By same authority, one definition of employed is: 'To give employment to,' 'to have employment.'

"So employed' in its connotation means engaged in giving beauty treatment as a business in a beauty shop under contractual arrangement whereby the proprietor derives an income from such business.

"This meaning is given emphasis in the last sentence of Schedule 21. This Schedule of fees, not the basic fee of \$10, is levied on beauty parlor colleges which engage in beauty parlor work 'for which a charge is made or material used is charged therefor.'

"Here is no suggestion that student operators must be employees in the usual sense. Is beauty parlor work done for which a charge is made? That is the test." (Emphasis supplied)

The dictum in the above excerpt "This Schedule of fees, not the basic fee of \$10, is levied on beauty parlor colleges ***," evidently means "This Schedule of fees, not merely or only the basic fee of \$10, is levied on beauty parlor colleges ***."

See also Biennial Report of the Attorney General, 1936-38, page 451.

In my opinion, if instructors in a "school of beauty culture" demonstrate on customers for the benefit of the students, and the customers pay therefor any charge, nominal or otherwise, for services or material, then the operator must procure the basic license provided by the statute, *supra*, and operator's license for each instructor.

Your second question must be answered in the affirmative, for the reasons pointed out in answer to your first question.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 22, 1942.

Hon. W. Bentley Thomas,
Tax Assessor,
Jackson County,
Scottsboro. Alabama.

Code 1940, Title 51, §§ 15, 39—Homestead Exemptions.

1. If taxpayer fails seasonably and appropriately to list value and assess his homestead for taxation he thereby **waives the right** to such exemption under Code 1940, Title 51, §15.

2. To avail himself of such exemption he must separately list value and assess his homestead for taxation as required by Code 1940, Title 51, § 39, and appropriately assert or claim the exemption at the time of assessment.

3. If seasonably and appropriately claimed the right of homestead exemption may arise as to property not actually occupied by the claimant as his homestead at the time of assessment, provided at the time and on October 1 of the tax year the taxpayer had a bona fide intent openly manifested, to occupy such property as a homestead as soon as practicable thereafter.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion bearing date of May 21, 1942, which is as follows:

"Please give me ruling as early as possible on following:

"Mr. 'A' bought lot and starting to build home (some 12,000 to 15,000) had all material and building practically complete by Oct. 1st, 1941. Board placed \$2000.00 assessment on same. Mr. 'A' filed protest on same.

"Was above taxable? Mr. 'A' did not move into home until this spring."

All property unless expressly exempt therefrom by the Constitution or by statute is subject to be assessed for taxation by the owner at sixty per cent of its "fair and reasonable market value" on October 1 each year for the tax year then beginning. Code 1940, Title 51, §§ 17, 39.

The taxpayer is however entitled to a homestead exemption from state ad valorem taxes not exceeding \$2000 in assessed value (Code 1940, Title 51, § 15), but is required upon assessment of his property each year to list and value his homestead separately and also to list and value separately his "land and improvements thereon." Code 1940, Title 51, § 39. Upon failure of the taxpayer thus to list, value and assess his property the tax assessor may list, value, and assess the same, subject to review by the county board of equalization.

The aforesaid homestead exemption to be available to the taxpayer must be duly, seasonably and appropriately claimed by him upon his assessment list; otherwise it is waived. Quarterly Reports, Attorney General: Vol. IX, p. 10; Vol. XIII, p. 87; Vol. XVIII, p. 165; Biennial Report, Attorney General, 1936-1938, p. 424.

From your letter it appears that the county board of equalization has valued a taxpayer's property at \$2000 for taxation for the year beginning October 1, 1941, and that said property consists of a lot then owned by him on which at a cost of \$12000 or more he had practically completed improvements at that time. It may be inferred from your letter that said improvements consisted of a residence building now occupied by the taxpayer as his homestead.

It does not appear however that the taxpayer seasonably and appropriately listed, valued and assessed this property for taxation or that he seasonably and appropriately claimed any exemption with respect thereto as authorized by law.

I find nothing therefore to indicate that the taxpayer is now entitled to any homestead exemption as to said property or that it is not taxable or exempt from taxation for the tax year beginning October 1 last.

If on the other hand the taxpayer did list, value and assess this property for taxation and assert at the time his claim to homestead exemption therein, he is entitled to such exemption to the extent of \$2000 of assessed value, if on October 1 last he had a bona fide intent, openly manifested, of occupying said property as his homestead, and did not, of course, at the time claim other property also as so exempt. Quarterly Report, Attorney General, Vol. XIX, p. 317.

You do not say on what ground the taxpayer bases his protest or claims that the property in question is not "taxable" or subject to assessment. I think however it may be fairly inferred that the facts are as I have stated them, and accordingly this opinion is based on such inference.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 23, 1942.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
State Capitol.

Code 1940, Title 51 § 630-645—Lubricating Oils—Excise Tax—Reports and Returns—Sales by one distributor, manufacturer, retailer or storer to another distributor, manufacturer, retailer or storer.

1. State Department of Revenue authorized to prescribe and furnish forms for reports of sales and payment of the excise lubricating oil tax imposed by Code 1940, Title 51, §631, and to revise such forms from time to time.

2. A licensed distributor, manufacturer, retailer or storer not authorized to sell lubricating oils to another licensed distributor, manufacturer, retailer or storer without reporting such sale to the Department of Revenue on the forms prescribed by it, in any event, and without paying also the tax thereon, unless such tax has been previously paid with respect to the oil so sold.

3. The purchaser in such case is under no obligation to the vendor to pay the tax, although the vendor may or may not include the tax in the purchase price as he sees fit.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of May 23, 1942, is as follows:

"Please refer to Section 630, 641, 633, 641 (sic) and 645 of Title 51, 1940 Code of Alabama and advise me on the following questions:

"1. Has the Department of Revenue full and complete authority under Article 4, Title 51, 1940 Revenue Code of Alabama, and particularly under Section 641 thereof, to formulate and furnish a Uniform System of Monthly Tax Return blanks which are to be filled out by every person upon whom this excise tax is levied, and, also, to revise such forms from time to time when deemed necessary.

"2. Is there any authority of law found under Article 4 of Title 51, 1940 Revenue Code of Alabama, or implied under any other law of the State of Alabama permitting one distributor, manufacturer, retail dealer or storer of lubricating oil, as defined in Section 630, Title 51, 1940 Revenue Code of Alabama, doing business under the laws of the State of Alabama, to sell to another distributor, manufacturer, retail dealer or storer, also, doing business in the State of Alabama, lubricating oils and its substitutes without being required to report such sales and at the same time of making such report paying an amount of money equal to the tax of two cents per gallon on such sales?

"3. Can any distributor, manufacturer, retail dealer or storer of lubricating oils as defined in Section 630, Title 51, 1940 Revenue Code of Alabama, doing business in the State of Alabama, buy such lubricating oils from another distributor, manufacturer, retailer dealer or storer without paying to the vendor the excise tax of two cents per gallon thereon, and can such distributor, manufacturer, retail dealer or storer sell to another distributor, manufacturer, retail dealer or storer, doing business in the State, without collecting from the vendee the excise tax of two cents per gallon there? (sic)

"4. In the event any distributor, manufacturer, retailer dealer and/or storer of lubricating oil, should make sales of lubricating oils and its substitutes to any other distributor, manufacturer, retailer and/or storer doing business within the State, without collecting and properly reporting such sales by paying the excise tax thereon, what is the liability between the vendor and vendee in respect to the unpaid excise tax thereon?

"We are at present conducting an examination of the Gasoline Tax Division of the Department of Revenue and it would be very helpful to us if you would give us an answer to this request as soon as possible. Any special effort you can make toward rendering an opinion will be highly appreciated."

Code 1940, Title 51, §§ 630-645 (Revenue Code, 1940, Ch. 20, Art. 4) imposes an excise tax upon distributors, manufacturers, retail dealers and storers of lubricating oil as therein defined and further provides in Section 631, that "where the excise tax of two cents per gallon upon the sale of lubricating oil shall have been paid by a distributor, or manufacturer, or retail dealer, or storer such payment shall be sufficient, the intention being that the tax shall be paid but once."

The Department of Revenue is authorized and empowered to assess and collect the tax and in that connection, in Section 641, to prescribe the form of all statements, reports and returns therein required to be made by such distributors, manufacturers, retail dealers or storers.

Said distributors and others are expressly required to keep such records "as will clearly show the amount of sales or withdrawals of any oils * * * " (§636) and to report to the Department on forms so furnished and prescribed by it their respective post-office addresses and places of business and changes thereof from time to time (§637).

It is further provided that upon default by such distributors and others in making the required monthly returns prescribed by the Department, the Department itself may make a return for the delinquent and assess thereon the tax due, together with a penalty. (§642). The department may also, from time to time, examine the records and accounts required to be kept by distributors and others, and it is a misdemeanor to fail to make the required reports or to keep the records required to be kept by Section 636, of Title 51.

It is also provided that if the tax is not paid within thirty days after it becomes due the Department may, after ten days notice to the delinquent,

make its assessment final and issue execution thereon for the collection of the tax (§643). Finally, reports of sales or withdrawals and payment of the tax due with respect thereto must be made "on or before the twentieth day of each calendar month." (Section 654). It is not expressly stated, however, what period is to be covered by such reports so required to be made "on or before the twentieth of each calendar month," but it may be assumed, I believe, that the Legislature intended to make the reports cover the preceding calendar month.

Thus it will be seen that the Department of Revenue was entrusted with complete and exclusive supervision of the assessment and collection of said tax, and, necessarily, therefore, in the absence of express specific provision to the contrary, and in view also of the express provisions of Section 641, *supra*, it is authorized to take such action as may be necessary and proper for that purpose, including the prescription, furnishing, and revision of forms whenever necessary from time to time.

It will be seen also that the tax, by the very terms of the statute, is imposed, as declared in Section 631, *supra*, upon distributors, manufacturers, retail dealers, and storers, and is to be measured by the number of gallons sold or withdrawn from storage; with express provision, however, that such tax shall be paid but once. The result, therefore, as I see it, is that when once the tax has been paid further payment thereof with respect to oil previously taxed is unauthorized.

Construing the foregoing provisions of the statute as a whole and giving to each of them such construction as will make it harmonize with all other provisions, and having in mind the dominant provision that the tax shall be paid but once, I advise you as follows:

1. The Department of Revenue is authorized and empowered, to quote your own expression, "to formulate and furnish a uniform system of monthly tax return blanks which are to be filled out by every person upon whom this excise tax is levied, and, also, to revise such forms from time to time when deemed necessary."

2. No distributors, manufacturers, retail dealers or storers are authorized to sell to another distributor, manufacturer, retail dealer or storer the lubricating oils subject to the tax without reporting such sales in any event, and without paying the tax due with respect to such sale contemporaneously with such report, unless the tax has been previously paid as required by law.

3. A purchaser or vendee of lubricating oil, as defined by the statute, though he be a distributor, manufacturer, retail dealer or storer, is under no obligation to the seller or vendor to pay the tax, either to the seller or vendor, or otherwise, in the absence of some contract obligation as between himself and the seller or vendor. As already stated, the tax is imposed upon the vendor or upon the one who withdraws from storage. The State is not concerned with the purchase price, whether it include or not the amount of tax payable with respect to the oil purchased. There is no obligation upon the vendor to collect the tax from the vendee. He may include it in the purchase price or not, as he sees fit.

4. I have heretofore indicated there is not liability as between vendor and vendee with respect to the tax and no obligation on the vendor to collect the tax from the vendee. There is, however, an obligation on the vendor to report the sale and to pay the tax out of his own pocket unless the same has been previously paid by some other vendor, distributor, storer or manufacturer.

These views are in harmony with previous opinions of this office holding that the tax falls on the vendor and not on the vendee, and that it is immaterial to the State whether or not the vendor collects it from the vendee, the concern of the State being only that it is paid and reported by the vendor. See Quarterly Reports of the Attorney General: Vol 14, page 70, dated January 31, 1939, to Hon. A. H. Collins, State Superintendent of Education; Vol. 14, page 175, dated March 9, 1939, to Hon. H. G. Caudle, Member Board of Education, Jefferson County.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 23, 1942.

Hon. Walter B. Jones, Director,
Department of Conservation,
Montgomery, Alabama.

Department of Conservation—Wild Deer—

Section 10, Title 3, Code of 1940 has no application to wild deer or other wild animal.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion, bearing date of June 16, 1942, is as follows:

"In a case tried in the circuit court of Washington County the defendant was convicted of killing a deer out of season.

"On the trial, the defendant admitted killing the deer but offered evidence in mitigation or justification that the deer was trespassing upon a growing crop. The court judged the jury that such circumstances was no justification of the offense and could not be considered in mitigation thereof.

"Section 10, Title 3 of the 1940 Code of Alabama is as follows:

"Upon trial, the defendant may prove in mitigation or justification, as the jury may determine, that, at the time of the injury, the animal killed or injured was trespassing and had within six months previously thereto trespassed upon a growing crop, inclosed by a lawful fence or cultivated without a fence, where stock laws prevail; and no conviction must be had, if it is shown that, before the commencement of the prosecution, compensation for the injury was made or tendered to the owner."

"It is our belief that the legislature intended this section to apply only to domesticated animals and not game animals. It would be simple for a person to grow a crop for the purpose of baiting game animals in order to shoot them out of season."

"I would like to have your official opinion on the interpretation of Section 10 as to its application to wild deer."

In replying to the above request, you are advised that, in my opinion, Section 10, Title 3, Code of Alabama, 1940, has no application whatsoever to wild deer.

Section 9, Title 3, Code of Alabama, 1940, reads as follows:

"§9. Wanton or malicious injury to animals or articles of value.—Any person, who unlawfully, wantonly, or maliciously kills, disables, disfigures, destroys, or injures any animal, or article or commodity of value, the property of another, must, on conviction, be fined not less than twice the value of the injury or damage to the owner of the property, nor more than five hundred dollars and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months; and so much of the fine as may be necessary to repair the injury or loss shall go to the party injured."

It is to be noted from the above quoted Code section that this section only applies to persons who unlawfully, wantonly, or maliciously kill or destroy any animal, the property of another person. Section 10 of Title 3 provides for the mitigation or justification of the offense of those persons tried for the violation of Section 9, *supra*. Section 82 of Title 8, Code of 1940 provides that the title to all wild birds and animals in the State of Alabama, or within the territorial jurisdiction thereof, is vested in the State. It thus appears that no one is the owner of a wild deer, and as Section 9, *supra*, only applies to animals owned by some person, it therefore follows that Section 10, *supra*, which provides for the mitigation or justification of the offense set out in Section 9, could not apply to wild deer or other wild animals.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 24, 1942.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Code 1940, Title 51, §§ 646-687—Gasoline Tax—Forms of Reports of Sales and withdrawals—Purchases and Sales by Licensed Dealers—

1. Department of Revenue authorized to prescribe, revise and furnish forms required for reports to it of sales and withdrawals of gasoline subject to excise tax imposed by Code 1940, Title 51, §647.

2. Licensed Dealers of gasoline under Code 1940, Title 51, §667 may buy and sell as among themselves, and the payment of the tax is imposed on the vendor, unless it has been previously paid by a prior vendor, distributor, or storer.

3. When the tax has once been paid as to a particular lot of gasoline it thereupon becomes "tax free" and may be bought and sold by licensed dealers without payment of additional tax thereon, provided however all sales, distributions and withdrawals by licensed dealers should be reported, whether or not the tax has been previously paid thereon.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of May 23, 1942, is as follows:

"Please refer to Sections 647, 648 and 649 of Title 51, 1940 Code of Alabama and advise me on the following questions:

"1. Has the Department of Revenue complete authority under Article 5, Title 51, 1940 Revenue Code of Alabama, and particularly under Section 649 thereof, to formulate and furnish a Uniform System of Monthly Tax Return blanks which are to be filled out by every person upon whom this excise tax is levied, and, also, to revise such forms from time to time when deemed necessary?

"2. Is there any authority of law found under Article 5 of Title 51, 1940 Revenue Code of Alabama, or implied under any other law of the State of Alabama, permitting one dealer, distributor, refiner or storer of gasoline, holding an uncanceled license to engage in the business of selling gasoline, etc., to sell to any other dealer, distributor, refiner, or storer of gasoline, holding a similar license gasoline without being required to report such sales, and at the same time of making such report paying an amount of money equal to the excise tax of six cents per gallon on such sales?

"3. Has a dealer, distributor, refiner and/or storer of gasoline as defined in Section 646, Title 51, 1940 Revenue Code of Alabama, holding an uncanceled license to engage in the business of selling gasoline by giving the proper bond as required under Section 670, Title 51, 1940 Revenue Code of Alabama, as amended under Act 608, approved July 5, 1940, found on page 515 of the 1940 Revenue Code, any implied right or otherwise, to buy and sell such gasoline within the State of Alabama tax free, that is to say, can such a bonded licensed dealer buy from another such bonded licensed dealer within the State of Alabama gasoline without paying to the vendor the excise tax of six cents per gallon thereon; and can such a bonded licensed dealer sell to another such bonded licensed dealer within the State of Alabama gasoline without collecting from the vendee the excise tax of six cents per gallon thereon?

"4. In the event any bonded licensed dealer, distributor, refiner and/or storer of gasoline, holding an uncanceled license to deal in gasoline as defined in Section 646 of Title 51, 1940 Revenue Code of Alabama, should make sales of gasoline to any other bonded licensed dealer, distributor, refiner and/or storer of gasoline within the State of Alabama, without collecting and properly reporting such sales by paying the excise tax thereon, what is the liability between the vendors and vendees in respect to the unpaid excise tax thereon?

"We are now conducting an examination of the Gasoline Tax Division of the Department of Revenue and it would be very helpful to us if you would give us an answer to this request right away. Any special effort you can make towards rendering an opinion will be highly appreciated."

The statute relating to gasoline excise tax imposed by Code 1940, Title 51, Section 647 will be found in said Code and Title in Chapter 20, Articles 5 and 6 and 1941 Cumulative Pocket Part, page 48, Section 670. The essential features of this legislation are that the "tax shall be paid but once," as expressly declared in Section 647, and that the assessment and collection of the tax, together with all necessary administrative procedure, are entrusted exclusively to the Department of Revenue.

The tax is imposed upon distributors, refiners, retail dealers, and storers of gasoline, as defined in Sections 646 and 647, and such persons are expressly required to be licensed before they can lawfully engage in the sale, distribution or storage of gasoline; and for such purposes, among other things, must execute bonds payable to the State of Alabama, conditioned "upon the prompt filing of true reports, and the payment * * * of any and all excise taxes accrued or accruing on the sale, distribution, or withdrawal from storage of gasoline which may now or may hereafter be levied or imposed by the State of Alabama, together with all penalties and interest thereon, and generally upon the faithful compliance with the provisions of this article," (Code 1940, Title 51, §670, as amended July 5, 1940, General Acts 1939, page 974). The tax is imposed upon all persons "storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use." (Section 648.)

The Department of Revenue, as already stated, is charged with the assessment and collection of the tax and to that end is authorized to examine the records of all persons subject to the tax and all records also of retail dealers who purchase from distributors, refiners, storers, or other retail dealers or from distributors, refiners, stores, or other retail dealers or from any other source on a basis of "tax paid" (§654.)

Persons subject to the tax are required to keep a record of sales, withdrawals, and distributions (§651), to report to the Department their post-office addresses and places of business and any change thereof, from time to time (§651-653), and, also, to make monthly sworn statements or reports on forms prescribed and furnished by the Department of all sales and withdrawals from storage (§§649-651).

Before dealing in the sale and withdrawal or distribution of gasoline, a dealer is required also to procure a license from the Department of Revenue and, in connection therewith, to file a bond as above stated, (§§667, 670, as amended, *supra*).

In order to answer your four numbered questions, as I understand them, I have thus undertaken briefly to summarize the essential provisions of the statutes as I construe them. They must be taken and considered, of course, as a whole and so construed as to give harmonious force and effect to each and every one of them according to the well-known canon of construction obtaining as to statutes *in pari materia*.

I am of opinion, therefore:

1. That the Department of Revenue is authorized, quoting your own words, "to formulate and furnish a uniform system of monthly tax return blanks which are to be filled out by every person upon whom this excise tax is levied, and, also, to revise such forms from time to time when deemed necessary."

2. That a licensed dealer is required to report all sales of gasoline upon the forms prescribed for monthly returns thereof, whether or not the tax has been previously paid upon the gasoline so reported as sold; and, if such tax has not been paid, then to pay the same at the time of making the report. If, however, the tax has been previously paid as to the gasoline so sold, then the reporting dealer can not be required again to pay the same because of the express provision of law that it shall not be paid but once.

3. That a licensed dealer may buy from another licensed dealer without paying to the latter the excise tax, inasmuch as the tax is imposed upon the vendor and not upon the vendee. The vendee's obligation arises only in case he shall subsequently sell or distribute the gasoline which he has previously bought. As heretofore indicated, the State is concerned only with the payment of the tax but once and after it has once been paid, I can see no restriction upon purchases and sale of so-called tax-paid gasoline by licensed dealers as between themselves; provided only that all such sales are duly and legally reported on the forms prescribed by the Department of Revenue, with some statement thereon as to whether or not the gasoline so reported as sold is "tax free."

4. Your question numbered 4 is not entirely clear to me and in response thereto, as I understand it, I can only say that it is a matter of indifference to the State whether the tax be actually paid by the vendor or the vendee, and that it is a matter for agreement between themselves as to what the purchase price shall be and as to whether or not the purchase price shall include the amount of tax. As already stated, the duty of reporting and paying the tax falls upon the vendor.

In reaching this conclusion, I have given due consideration, I hope, to an expression of the court in **State Tax Commission v. County Board of Education**, 235 Ala. 388, 179 So. 197, where it was said that: "while the excise tax * * * is levied for the privilege of storing gasoline, it is common knowledge, and the manifest intent of the law makers, that the tax burden be passed on to the consumer." As in all cases, no doubt, the gasoline excise tax, like many other taxes, falls upon the traditional ultimate consumer. Yet I find nothing in the statute itself or in the numerous detailed provisions for the administration thereof to modify the views above expressed, to wit, that in this instance, the tax is imposed upon, and must be paid by, primarily, at least, the dealer, vendor, or storer, wherever ultimately its burden may fall.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 24, 1942.

Hon. J. L. Laseter,
Judge of Probate, Barbour County,
Clayton, Alabama.

Filing Tax—Assignment of Mortgage—National Bank as Trustee
—Code 1940, Title 51, §§ 618, 619.

Each successive assignment of a mortgage originally executed to a national bank to secure its own debt, as to which no mortgage filing tax has been paid, is subject to the deed filing tax, regardless of the fact that such assignment may be made to a national bank as trustee for another.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of June 12, 1942, is as follows:

"Your opinion is requested on the following state of facts:

"In March, 1939, there was recorded in this office a mortgage on real estate in this county made to the First National Bank of Wetumpka, Ala., under the Federal Housing Act. Upon this mortgage no record tax was payable and none was paid.

"Said mortgage was in April 1939, assigned by the First National Bank of Wetumpka, to Birmingham Trust and Savings Company, which presented the instrument of assignment to me for recording and upon it, following your ruling (Rep. Atty. Gen., 1936-38, p. 729) the deed tax was collected.

"Very recently the Birmingham Trust and Savings Co. has assigned the same mortgage to 'The First National Bank of Birmingham and Jelks H. Cabaniss as Co-trustees under the will of Harold R. Sanson, deceased.' The First National Bank of Birmingham, one of the co-trustees, has forwarded the instrument of transfer to me for recordation.

"Having in mind the general rule that instruments made to National Banks are exempt from the record tax, yet from the fact that the assignee National Bank appears in the assignment clause above-quoted in the capacity of a co-trustee with an individual, I am submitting the facts to you, and will appreciate your opinion, at your earliest convenience whether said last described assignment of said mortgage is subject to the deed record tax, or not.

"P. S., We want this within the next two or three days."

In an opinion dated July 3, 1941, to Hon. Eugene H. Hawkins, Judge of Probate, Jefferson County, Quarterly Report, Attorney General, Vol. XXIV, p. 12, it was held that a mortgage to a national bank as trustee to secure a debt to the bank and also other debt was exempt from the filing tax only to the extent of the bank's debt, and was subject to said tax to the extent of the other indebtedness.

And so in another opinion dated November 28, 1932, to Hon. E. A. Hammett, Judge of Probate, Talladega County, Biennial Report, Attorney General, 1932-34, p. 46, it was ruled that a mortgage to a national bank as trustee to secure debt due to another was subject to the mortgage filing tax to all intents and purposes the same as if the bank were not a party to the instrument.

Likewise, as noted in your letter, this office held that the assignment or transfer of a mortgage, exempt from filing tax because of its execution to a national bank to secure the bank's debt, is subject to the deed filing tax.

From your letter I infer that "The First National Bank of Birmingham and Jelks H. Cabaniss as co-trustees under the will of Harold R. Sanson, deceased" now hold the mortgage by assignment, not for the benefit of the bank, but as an investment of funds belonging to the estate of said decedent, and that the bank is not beneficially interested in the mortgage or in the mortgaged property or debt so assigned.

I am of opinion, therefore, that the deed filing tax (Code 1940, Title 51, § 618) should be paid upon the assignment, inasmuch as no mortgage filing tax has been paid with respect to the mortgage itself. Each successive assignment of the mortgage operates, in my opinion, as a conveyance of an interest in real property and is subject as such to the deed filing tax, unless perchance the assignee can establish a status of exemption. No basis for exemption appears from the facts stated in your letter.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 25, 1942

Hon. Walter B. Jones, Director,
Department of Conservation,
C A P I T O L .

Arrests—Sheriffs—Game Laws—

1. A person convicted and sentenced to jail for violation of the game laws who has been erroneously released by the sheriff may be rearrested.
2. Such rearrest may be made even though time for appeal has not expired.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your letter of June 11, 1942, in which you request official opinion, is as follows:

"Recently, a person who had been convicted for violating the game laws was sentenced to a jail term for failure to pay his fine. He was erroneously released by the sheriff of the county in which the violation occurred. We would like to have your official opinion on three questions involved in this case.

"1. Can the person so released be rearrested?

"2. Can the person so released be rearrested before his time for appeal has expired?

"3. If the violator cannot be rearrested, is the person who released him responsible to the State of Alabama for the fine involved?

"Similar cases frequently occur and we would like to have your opinion on this matter in order to advise our game wardens throughout the State."

In answer to your first inquiry, it is my opinion that a person who was convicted of violating the game laws of the State of Alabama, sentenced to jail for failure to pay the fine imposed upon him by the court, and who was erroneously released by the sheriff of the county in which the violation occurred, may be rearrested by the sheriff.

"Where a person has been illegally discharged, or released from prison after trial and commitment a peace officer may retake him without process, or on the same process, * * *. Accordingly, since a sheriff is not vested with any judicial authority or power to grant paroles or reprieves, his act in releasing a prisoner is void and the prisoner may be rearrested and this is true, even though the arrest occurs after the time in which the original sentence should have been served has expired." 6 C. J. S. Arrest Section 21.

An "escape" has been defined as the departure of a prisoner from custody before he is discharged by due process of law. Where a prisoner is voluntarily given any liberty not authorized by law he is a "voluntary escape." In the present instance the person convicted and sentenced to jail is a "voluntary escape." See **Hefler v. Hunt**, 120, Me. 10, 112 Atl. 675. A sheriff may at any time arrest an escaped convict. **McQueen v. State**, 180 Ala. 136, 130 So. 414.

In the case of **People v. Mallory**, 195 Ill. 582, 63 N. E. 508, the court said:

"* * * in criminal cases the people of the whole state have an interest in the due and proper detention and punishment of the violators of the criminal law and public interest cannot be made subservient to the illegal acts of those officers having charge of persons convicted of crime, and whose duty it is to execute the sentence of the court in accordance with its final process." See also **Hefler v. Hunt**, *supra*.

The person sentenced in your case was illegally released by the sheriff and thus became a "voluntary escape." He can therefore be rearrested and be made to serve the sentence imposed on him by the court.

In answer to your second inquiry it is my opinion that a person convicted of violating the game laws of the State, sentenced to jail for failure to pay his fine, and erroneously released by the sheriff may be rearrested by the sheriff before his time for appeal has expired.

Under Title 8, Section 47, Code of Alabama, 1940, the Justices of the Peace and the Inferior Criminal Courts of the various counties of the State of Alabama are given final jurisdiction to try and convict persons violating the game laws of the State. Sections 48 and 49 of said Title provide for appeals from convictions in said courts. Such appeal must be made to the Circuit Court in the county in which the offense was committed within ten days

from date of conviction, and on such an appeal the appellant may make bond as provided for in Section 49 of said Title 8. If the person after conviction and sentence is released by the sheriff before an appeal is taken as provided by Sections 48 and 49, such a release by the sheriff is an illegal act of the sheriff. Such persons so released by the sheriff may be rearrested even though the time in which he has to appeal from said conviction has not expired.

Since it is my opinion, in answer to your first inquiry, that a person so released may be rearrested, it is not necessary to answer your third inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 25, 1942

Hon. B. L. Knowles, Chairman,
Covington County Board of Equalization,
Andalusia, Alabama.

Taxation—Exemptions—Code 1940, Title 51, §§ (1) (m)—Raw Materials—Manufactured Articles.—

Rough green lumber produced by taxpayer from timber owned by it under contract with sawmill operators, and stored at or near the place of manufacture or within the county where same was manufactured or produced is exempt from taxation for twelve months after its production or manufacture.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of June 16, 1942, is as follows:

“Jackson Lumber Company of this County is a lumber manufacturer. It owns and/or buys timber and converts same into the finished product of dressed lumber, which is then sold to the lumber and building trades.

“The conversion of timber owned by said Company into the finished or manufactured product involves, as you know, several different operations or processes of manufacturing; e. g., (1) The cutting of trees and ‘snaking’ of logs—commonly referred to as ‘logging’; (2) Sawing of the logs into rough green lumber; (3) Drying or curing the green lumber by means of dry kilns or open air drying; (4) Planing and dressing of the dried lumber into required shapes and sizes.

"Said Company operates a sawmill, pays the licenses required by law for lumber manufacturers, and sells its finished products at wholesale from its plant.

"For the purposes of this ruling you are advised said Company has one item in its ad valorem tax assessment of \$17,500.00, which is a sixty per cent or tax valuation on rough green lumber stored on its yard at Lockhart. Said lumber is either going through the drying process or has gone through and is awaiting the planing or dressing process above mentioned. The taxpayer concedes that \$4,500.00 of said lumber is **purchased** from other sawmill operators and therefore an ad valorem tax is properly due on such amount, but it contends the balance or \$13,000.00 is not subject to such taxation by reason of the exemptions granted under subsections (1) and/or (m) of Section 2, Title 51, Code of Alabama for 1940.

"The facts are that as to said balance of said assessment the rough lumber therein included is cut and sawed from timber owned by the taxpayer into rough lumber by various sawmill operators who contract to do so at an agreed rate of so much per board foot. In other words the taxpayer is the owner of the timber or lumber from the time it is a tree standing in the forest until it is converted, by the manufacturing processes above mentioned, into finished dressed lumber, and thus contends that it has merely contracted or let out one phase of the manufacturing process, to-wit: the cutting and sawing of trees into green lumber by an independent operator or contractor. The green lumber in question is not purchased by the taxpayer from the small sawmill operator for there is no payment based on grades as the operator merely receives an agreed sum per board foot for the lumber sawed by him, regardless of grade. This rough green lumber is not re-sold to any one, but is delivered by the small mill operator to the yard and plant of the taxpayer, where it subsequently undergoes the other phases of manufacturing heretofore mentioned. This same green lumber is thus converted into the finished manufactured product by the same taxpayer who owns same from the tree or raw material stage to the finished product. None of this lumber whether in the green or finished condition, is held by the taxpayer for more than twelve months.

"The question is whether or not the rough green lumber sawn by the operators with whom the taxpayer contracts, as above outlined, should be subjected to ad valorem taxation or be exempted as contended by the taxpayer. Please advise us at your earliest convenience in order that we may make the proper assessment."

I am of the opinion that under former rulings of this office the rough green lumber, above referred to as having been produced from timber owned by the taxpayer itself under contract with other sawmill operators, is exempt from ad valorem taxation for the year beginning October 1, 1941, provided on that day it was stored at or near the place of manufacture or within the county in which it was manufactured, or produced; and provided also that on said date it had not been manufactured or produced for more than twelve months.

In my opinion, the exemption arises under Code 1940, Title 51, Section 2 (m), which exempts manufactured articles in the hands of the producer or manufacturer under the conditions stated above. Said Section is as follows:

"The words 'raw material,' as used in said section, are limited to **crude materials**, with the exception of coke." (Emphasis supplied)

The conclusion here reached is not to be confused with that reached in an opinion of this office under date of March 20, 1940, to Hon. Harry L. Laz-enby, Tax Assessor, Monroe County (Quarterly Report of Attorney General, Volume XVIII, page 348), nor with the ruling of the State Tax Commission made on February 9, 1927.

The opinion of the Attorney General, supra, and the ruling of the State Tax Commission both dealt with an exemption claimed under subdivision (1) of Section 2 of Title 51, Code 1940, and its predecessor, which provide for exemption of "raw material."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 27, 1942.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Department of Finance,
Montgomery, Alabama.

Costs and Fees—Proration of Costs—Remittance of Overpay-
ment.—

1. Whenever cost is collected by the Clerk in any particular case, and amount collected is not sufficient to pay all the costs, then the amount so collected must be prorated among those entitled to share in the same; except trial tax, which is not cost, but an item of revenue.
2. When the Court assesses and the Clerk collects more cost than is actually due in any particular case, then the amount over and above the actual cost should be remitted to the person paying same

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of February 5, 1942, is as follows:

"In the light of the information stated below, please advise me in answer to the questions listed.

"State of Alabama)
) Driving While Intoxicated
vs.)
A. C. Barton, Alias)

"This day in open court came the State of Alabama by its Solicitor and the defendant in his own proper person and with his attorney and defendant in open court on this day waived arraignment on the indictment in this case charging him with the offense of driving while intoxicated and with consent of the State Solicitor defendant plead guilty to reckless driving.

"Thereupon in open court on this day the defendant being asked by the court if he had anything to say why the judgment and sentence of the law should not be passed upon him replied "he had not." It is, therefore, considered and adjudged by the court that the defendant is guilty of the offense of RECKLESS DRIVING as charged in the indictment and that the State of Alabama for the use of Mobile County have and recover of the defendant the costs of the prosecution and that the defendant be imprisoned in the Mobile County Jail for the term of thirty days.

"And it is further ordered and adjudged by the court that the defendant pay \$25.00 toward costs of court which said \$25.00 when collected by the Clerk to be by said Clerk disbursed as follows: \$1.50 towards State Trial Tax fees and the balance paid into the County Treasury of Mobile County.

"And it is further ordered and adjudged by the Court that the execution of the sentence in this case be and the same is hereby suspended pending the good behavior of the defendant for the period of six months and at the expiration of said six months period said suspension is hereby made permanent."

"May I propound the following questions, to wit:

"1. Out of the amount so collected, after the Trial Tax is paid in toto, should the balance be prorated towards the payment of other items of cost, if the amount collected is not sufficient to pay all items of cost in toto?

"2. In the event the amount assessed and collected is greater than the total amount of all costs what disposition should be made of said residue?

"3. In the event there is a greater amount collected than the total amount of the cost would the balance be payable into the State Treasury when the fine for the offense committed is payable to the State, viz., violation of the Highway Code and/or Rules of the Road?"

My answer to your first inquiry is in the affirmative. This office in an opinion addressed to Hon. Howard Kirby, Clerk of the Circuit Court of Etowah County, under date of December 31, 1940, (Quarterly Report of the Attorney General, Volume XXI, page 252), held that where costs are collected and the amount is not sufficient to pay all the costs of the case, the amount so collected should be prorated among those entitled to the same with the exception of the trial tax. The trial tax should not be prorated but should be paid in full, as it is an item of revenue, and is a tax rather than part of the cost. Quarterly Report of the Attorney General, Volume XV, page 301. Quarterly Report of the Attorney General, Volume XIV, page 311. *State v. Montevallo Coal Mining Company*, 29 Ala. App. 318, 197 So. 82.

In replying to your second inquiry, you are advised that if more cost is actually collected from the defendant than the true amount involved, then the amount over and above the actual cost in the case should be remitted to the defendant, or such other person as may pay such cost. There is no authority for the Court to assess or for the Clerk to collect more cost than that which has actually accrued on the trial of the case.

In answer to your third inquiry, you are advised that the amount over and above the cost actually accrued in the case would not be payable as a fine to the State, but should be remitted to the defendant for the reasons set out in my answer to your second inquiry. This money could never be treated as a fine, for the judgment entry set out in the above request makes no mention of the fact that a fine was imposed.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 27, 1942.

Mrs. F. C. Turner,
Judge of Probate,
Washington County,
Chatom, Alabama.

Taxation—Delinquent Taxes — Sale of Land for —

1. A delinquent taxpayer may prevent the sale of his property even after it has been advertised for sale by paying the taxes and legal costs which have accrued at the time of payment.

2. A stranger, a mere volunteer or intermeddler, may prevent the sale of property for taxes, even after it has been advertised for sale, by paying the taxes and legal costs which have accrued at the time of such payment.

3. The payment of taxes by a stranger, a mere volunteer or intermeddler, will divest the lien and inure to the benefit of the owner, and can not be made the foundation of any right or claim to the property on the part of such third person.

Opinion by Assistant Attorney General Russell.

Dear Madam:

Your request for official opinion, bearing date of May 23, 1942, is as follows:

"After a piece of land has escaped taxes for several years and no one claims it, and the tax assessor discovers it and turns it over to the Collector to advertise and sell, can a person who has no interest whatsoever come in before the sale and pay up the taxes and cost. Is this legal, of course we know that legally speaking he has no title, but is it right and can the Tax Collector legally let him do this. It just occurs to me that it should be sold in the legal and usual way, on the date of sale, giving each person a right to bid on the property. Let me have your opinion on this at your earliest convenience and oblige."

In my opinion, your inquiry should be answered in the affirmative.

It is the general rule that a delinquent taxpayer may prevent the sale of his property, even after it has been advertised for sale, by paying the taxes and legal costs which have accrued at the time of the payment. 61 Corpus Juris, Section 1234, page 960; *Eaton v. Noyes*, 78 A. 1080, 76 N. H., 52. It is also the general rule that the payment of taxes by a stranger, a mere volunteer or intermeddler, will divest the lien and inure to the benefit of the owner, but it cannot be made the foundation of any right or claim to the property on the part of such third person. 61 Corpus Juris, Section 1224, pages 949-950; Opinions of Attorney General, Volume XXII, page 49.

It is therefore my opinion, in view of the general principles of law heretofore set forth, that one who has no interest in a parcel or tract of land, which has been advertised for sale for delinquent taxes, may, before such sale, pay the taxes and accrued legal costs, and thereby prevent the sale of such land. Such action on the part of a stranger, a mere volunteer or intermeddler, would divest the lien for taxes but would not benefit such stranger, as the benefit derived would inure to the rightful owner. The mere fact that the property was assessed to "owner unknown" would not change the legal principles involved, and such action by a stranger would not give him any right, title, or claim in or to the property.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 29, 1942.

Hon. W. C. Register,
Tax Assessor, Geneva County,
Geneva, Alabama.

Taxation — Mineral Interests — Joint Owners — Assessment —

Where the owner of title to the fee in lands is also the owner of one half of mineral interests therein, and separately assesses the land and mineral interests, the owner of the other moiety of the mineral interests is entitled to assess his interest for taxation. And if the said owner of the other moiety fails to assess the same for taxation, the tax assessor may make an escape assessment under the provisions of Section 53 of Title 51 of the Code.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

Your request for official opinion bearing date of June 19, 1942, is as follows:

"On December 6th, 1939 Mr. J. H. Maloy, Samson, Ala. assessed for 1940 tax the mineral rights on 598 acres land, but has not paid this assessment and advises the Collector to sell for taxes, he hopes to buy at tax sale to better perfect his title.

"He bought these lands from the Federal Land Bank several years back but the Federal Land Bank retained the ownership in one-half of the mineral rights on these lands and so set it out in the face of the deed.

"On this date the Federal Land Bank comes with an escape assessment for their half of the mineral rights on the same lands for five years back prior to 1942, which they assessed regular last Fall.

"Can I accept the Federal Land Bank assessment? If so, what shall I do with the J. H. Maloy assessment?

"Please advise me at an early date, the Federal Land Bank is wanting to pay the taxes.

"Our Tax Collector has not had his 1940 tax sale as yet and I believe the Federal Land Bank is wanting to pay before they can be sold under the J. H. Maloy assessment."

In my opinion, your inquiry must be answered in the affirmative.

As I understand, the title to the land is in Mr. J. H. Maloy, and he owns one-half of the mineral interests or rights therein, the other one-half being retained by the Federal Land Bank in the deed by which it conveyed the title to the land to Mr. Maloy.

Subsection 8 of Section 47 of Title 51 of the Code of 1940 provides:

"8. Mineral, coal, oil, gas, timber and turpentine interests, when they have been so severed in ownership from the soil, or trees, by sale, or otherwise, shall be separately returned for assessment, which return shall show the land in or on which said mineral, coal, oil, gas, timber and turpentine interest is located."

The fact that Mr. Maloy has separately assessed the mineral interests or rights in the land does not prevent the Federal Land Bank from assessing its moiety of the same for taxation during the period of the tax year within which assessments are made. Cf. Quarterly Reports, Attorney General, Vol. XXII, page 44, Vol. XXI, page 159.

Mineral interests or rights in lands belonging to the owner of the fee of the lands are not ordinarily separately assessable. Subsection 8 of Section 47 of Title 51, supra. The action of Mr. Maloy in separately assessing his one-half interest in the mineral rights in the land as to which he was the owner of the fee, and also assessing the land, is comparable to the action of a taxpayer who owns a house and lot separately assessing the house and the lot on which the house is situated. In any event, however, the Federal Land Bank was the owner of a moiety in the mineral interests and rights in the land; it had not returned the same for taxation over a period of years; and under Section 53 of Title 51 of the Code of 1940, it is the duty of the tax assessor, when he discovers that any subject of taxation has escaped taxation, to list, return and value the same for assessment for the years during which it has escaped taxation, not exceeding five years preceding the date of the escape assessment. He must assess the penalties thereon, and must do the other things required and provided in said Section 53 to the end that the taxes due thereon may be recovered.

Answering your inquiry as to 'what you shall do with the Maloy assessment, if the Land Bank has the right to make the assessment,' you are advised that you should let both assessments stand. However, when the tax collector comes to collect the taxes due on the mineral interests or rights, he should collect no more than is due. When the amount of taxes legally due upon a piece of property is paid, the state's lien for such taxes is discharged, although the payment may have been made by a stranger, a volunteer or an intermeddler. Quarterly Report, Attorney General, Vol. XXII, pages 49, 51.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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